SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 528

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH

No. 529

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL.

No. 530

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, ET AL.

No. 531

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, ET AL.

No. 532

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, ET AL.

679355—46——1

No. 533

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER
v.
ABRAHAM COLE HYATT, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 In United States Circuit Court of Appeals Fourth District

APPENDIX TO BRIEF FOR APPELLANT

SECTION A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

Judgment

Filed March 17, 1945

This case came on to be heard on the allegations of the petition to condemn, the allegations of the answer filed on behalf of the respondent, and evidence taken in open court.

The Court, having duly considered the same, is of the opinion that the objections offered by the respondent to the right to condemn the lands, as set out in the answer, are well taken and are sustained.

It is therefore ordered, adjudged, and decreed that the objections to the right to condemn, and the prayers contained in the answer for dismissal of petition, be, and the same are, hereby sustained.

It is further ordered, adjudged, and decreed that the order of taking made and entered by this Court on March 23, 1944,
2 be and the same is hereby modified to the extent that the Authority shall not, after this date, exercise the right of possession or control over any of the lands of Tract No. FR–1092 belonging to respondent except such of said lands as are below the level of the reservoir.

It is further ordered, adjudged, and decreed that S. Columbus Welch may execute and deliver forthwith to the Authority or to the United States of America a deed, with full covenants of warranty, conveying all of the lands contained in the description of said tract No. FR–1092 located and lying below said reservoir. The description in said deed shall cover all the land owned by the respondent which is to be submerged by water impounded by the Fontana Dam.

It is further ordered, adjudged, and decreed that S. Columbus Welch, upon the payment to him by petitioner of the sum of $300.00, shall forthwith make, execute, and deliver to the Authority a deed, with full covenants of warranty, conveying to the United States or to the Authority an undivided one-half fee simple interest in and to the lands described in tract FR-141 as set out by metes and bounds in the petition filed in this cause.

And it is further ordered, adjudged, and decreed that S. Columbus Welch, respondent, shall forthwith execute and deliver to the petitioner herein a deed of release, releasing, acquitting, and discharging Tennessee Valley Authority, its successors and assigns, and its agents and employees; the United States of America;
the State of North Carolina; the State Highway and Public
3 Works Commission of North Carolina; and Swain County, North Carolina; of and from all obligations, liabilities, claims, and damages of every nature, character, or description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience or injury resulting to the lands owned by respondent and designated in the petition as tract No. FR-1092, as fully described by metes and bounds in said petition, and to any other lands owned by respondent within the reservoir area of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from, or to be in any way connected with the construction of said Fontana Dam or the creation or operation of Fontana reservoir, including but not limited to:

(a) The loss, destruction, and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the said State of North Carolina and all its political subdivisions;

(b) Loss, damage, impairment, interference, or injury to the property described in the petition, forever releasing the State of North Carolina and any of its political subdivisions from furnishing or providing any roads or means of access whatever to any of said lands owned by respondent described and set out in the petition filed herein.

It is ordered, adjudged, and decreed that S. Columbus Welch, respondent, his heirs, assigns, executors, or administrators,
4 upon notice or demand forthwith execute and deliver unto the State of North Carolina and/or the United States Department of the Interior a deed for a right of way over any of the lands of respondent referred to as tract No. FR-1092, for the construction and maintenance of a road or highway through and

over any of said lands, said right of way to be and include such width as the said State of North Carolina, and/or United States Department of the Interior is acquiring and using through and over adjacent lands for said road purposes, with the right on the part of the State and/or United States Department of the Interior to restrict the use of said road or highway from commercial traffic; and said land of respondent, S. Columbus Welch, is burdened with the future possibility of said easement.

March 16, 1945.

E. Y. WEBB,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

Judgment

Filed March 17, 1945

This case came on to be heard on the allegations of the
5 petition to condemn, the allegations of the answer filed on behalf of the respondents, and the evidence taken in open court.

The Court, having duly considered the same, is of the opinion that the objections to the right to condemn, as set out in the answer, are well taken and should be sustained.

It is therefore ordered, adjudged, and decreed that the said objections to the right to condemn, and the prayers contained in the answer for the dismissal of the petition, be and the same are hereby sustained.

It is further ordered, adjudged, and decreed, by consent of the respondents, that John Burns and Julia Burns will not require either the Authority, the State of North Carolina, or Swain County, to build or maintain any access road or roads to the lands embraced in tract FR-19, designated in the petition filed in this cause, by reason of the covering or flooding of Highway 288. It is adjudged that the respondents, John Burns and wife, Julia Burns, shall have no cause against either the Authority, the State

of North Carolina, or Swain County, by reason of the flooding by the Authority of Highway 288.

March 16, 1945.

E. Y. Webb,
U. S. District Judge.

6 In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 526

United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, petitioner

v.

Fred Lollis, respondent

Judgment

Filed March 17, 1945

This cause coming on to be heard upon the petition filed [by] the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the respondent, Fred Lollis, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that petitioner is not authorized and empowered, under the Acts of Congress creating the Tennessee Valley Authority, to condemn the lands described in its petition, for the reasons set forth in my Findings of Fact and Conclusions of Law and Memorandum Opinion.

It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court dated 24 day of May 1944, signed on the ex parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley
7 Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. Webb,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, RESPONDENT

Judgment

Filed March 16, 1945

This cause coming on to be heard before me upon the petition filed by the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the respondent, Arnold E. Bradshaw, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that the petitioner is not authorized and empowered under the Acts of Congress creating the Tennessee Valley Authority to condemn the lands described in its petition, for the reasons set forth in my Findings of Fact and Conclusions of Law and Memorandum Opinion.

8 It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court dated 24 day of May 1944, signed on the ex parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, RESPONDENT

Judgment

Filed March 16, 1945

This cause coming on to be heard upon the petition filed by the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the
9 respondent, Philip G. Rust, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that the petitioner is not authorized and empowered under the Acts of Congress creating the Tennessee Valley Authority to condemn the lands described in its petition, for the reasons set forth in the Findings of Fact and Conclusions of and the Memorandum Opinion.

It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court dated 24 day of May 1944, signed on the ex parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

10 In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, RESPONDENT

Judgment

Filed March 16, 1945

This cause coming on to be heard before me upon the petition filed by the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the respondent, Abraham Cole Hyatt, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that the petitioner is not authorized and empowered under the Acts of Congress creating the Tennessee Valley Authority to condemn the lands described in its petition, for the reasons set forth in the findings of fact, conclusions of law, and memorandum opinion.

It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court, dated 24 day of May 1944, signed on the ex
11 parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

12 SECTION B

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

Memorandum opinion

Filed March 17, 1945

It was agreed that the above-styled cases should be tried together, since the facts in each case are essentially alike, and the question of law in each case is identical.

The essential facts and the question of law in the above-styled cases are practically the same as the facts and the question of law in the cases of the Authority v. Fred Lollis, No. 526; the Authority v. Arnold E. Bradshaw, No. 548; the Authority v. Philip G. Rust, No. 549; and the Authority v. Abraham Cole Hyatt, No. 570; the petitioner in each case being the Tennessee Valley Authority, which I designate as the Authority.

13

I have signed a memorandum opinion in the four cases just named, and I adopt that opinion as a part of the opinion in the above-styled two cases, and am attaching a copy of said opinion to this memorandum opinion.

However, the respondent, S. Columbus Welch, has agreed that he will in no case, and under no circumstances, ask for any damages on account of any impairment, interference, or injury to his property, which may occur by reason of the flooding and covering, by the Authority's reservoir, of Highway 288. S. Columbus Welch has agreed in his pleadings to sign written instruments to this effect, relieving and releasing and acquitting the Authority, the United States of America, the State of North

Carolina, the State Highway and Public Works Commission of North Carolina, and Swain County, of and from all obligations, liabilities, claims, and damage of every nature, character, or description, whether now or hereafter existing, arising out of, or being in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience, or injury resulting to the lands owned by respondent and designated in the petition as tract FR–1092, as fully described by metes and bounds in the petition.

I am today signing a judgment in this case, holding that the Authority has no power to condemn the tract, No. FR–1092, except the acre and a half which will be covered by the reservoir. I am also including in the judgment an order requiring the respondent, S. Columbus Welch, to execute the instrument referred to, and adjudging further that he shall have no claim of any kind or character for damages against the Authority, the State of North Carolina, the United States, the State Highway and Public Works Commission, or Swain County. This binding agreement and judgment will make it unnecessary for the Authority or any one else to construct a road to Tract FR–1092, and, in order to set the whole matter out fully, I am embodying in my judgment the one proposed by counsel for S. Columbus Welch.

As to the suit against John Burns and wife, I hold that this land, not being in any way physically connected with or necessary to the construction and maintenance of the Fontana Dam, cannot be condemned by the Authority. These respondents, John Burns and wife, Julia Burns, have agreed, and I shall so order in my judgment, that they will not require either the Authority or the State of North Carolina, or Swain County, to build or maintain any access road or roads to the lands embraced in their tract, being FR–No. 19, and that they are willing that this agreement shall be entered as a part of my judgment.

This agreement on the part of John and Julia Burns, their heirs and assigns, will make it unnecessary for the Authority or anyone else to build an access road to their property.

I am of the opinion that the Authority has not the power to condemn the lands of Columbus Welch or John Burns and wife for the reasons given by the Authority's counsel. And I therefore conclude, as a matter of law, that the Authority has exceeded its power in undertaking to condemn the lands in question; and that it has no constitutional or legal right to do so.

This March 16, 1945.

E. Y. Webb,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 526

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, RESPONDENT

No. 548

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, RESPONDENT

No. 549

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, RESPONDENT

16 No. 570

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, RESPONDENT

Memorandum opinion

Filed March 16, 1945

It was agreed by all the parties that the above-styled cases should be tried together, since the essential facts in each case are practically the same, and the question of law in each case is identical.

All the parties agree that the lands sought to be condemned are from a half-mile to four miles from the high water mark of the reservoir.

The defendants contend that, this being so, the lands sought to be condemned have no physical connection with the Fontana Dam or reservoir and that the TVA, hereafter called the Authority,

has no power under the Acts of Congress creating it, and amendments thereto, to condemn these lands. The Authority contends that, since it agreed with the state to rebuild highway 288, most of which is or will be flooded by the reservoir, it has the power to condemn these lands, because it would be less expensive to condemn and buy the 44,000 acres than to build a new road. The Authority, considering it cheaper to buy or condemn the 44,000 acres, determined to do so; and, after having acquired title to this area, to transfer it to the National Park Service. It is a plain question of law as to whether Congress has given the Authority the power to condemn this land under the circumstances.

17 The pertinent part of the Act of Congress is as follows:

The Authority, or the corporation, "shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures and navigation projects at any point along the Tennessee river, or any of its tributaries, and, in the event that the owner or owners of such property shall fail and refuse to sell to the corporation at a price deemed fair and reasonable by the Court, then the corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this act."

It will be seen that this section gave the Authority or the Corporation the power to "acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures." Undoubtedly that language means that the Authority has the power to condemn all lands that are necessary for the construction and maintenance of the dam and reservoir. The lands in question have no physical connection with any part of the reservoir or the damsite. I do not think Congress ever intended that the power of eminent domain granted in this act should be liberally construed. The power of eminent domain is so supreme and imperial that, in my opinion, it should be construed strictly.

The Supreme Court of North Carolina, in the case of State v. Gulledge, 208 N. C. 207, says:

"It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following

18 powers, and no others: (1) Those granted in express words, (2) those necessarily or fairly implied, (3) those essential to the declared object and purpose of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

I think, in all cases of the exercise of eminent domain, where there appears any fair, reasonable doubt concerning the existence

of the power, it is resolved by the courts against the exercise of such power.

It is a dangerous doctrine to imply any eminent domain powers, and the corporation exercising such power should be held strictly to the definite powers granted by Congress.

Congress certainly never conceived that the Authority would undertake what it is doing in this case. Congress never dreamed that the Authority, in order to save some money in building a substitute road, would undertake to buy or condemn 44,000 acres of land for the purpose of dispossessing the occupants of these lands and making it unnecessary to construct the road.

I may agree that the plan of the Authority to acquire this land in order to save some money, and ultimately to transfer the land to the Park Service, is a good one. I may agree that some of the land owners, who refused to sell their homes and lands, where they have lived for years, are a little perverse or stubborn, but I cannot afford to punish their "perverseness" by "stretching" an act of Congress to the extent of giving the Authority the power to condemn their land.

19 In the case of Refining Company v. Elevator Company, 82 Mo. 121, we find this pertinent language:

"Laws which require the taking of private property for public use should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private rights, but an imperative public necessity, and the exercise of this right of eminent domain, under color of which so many iniquities have been committed, should be held strictly within the bounds provided by the constitution and the laws."

Again, we find this language in the case of Hervey v. Railroad, 174 Ill. 295:

"The appropriation of private property under the right of eminent domain is an exercise of sovereign power, and when reliance is placed upon statutes conferring the right, those statutes, being in derogation of common right, must be strictly construed, and the right cannot be exercised except in strict conformity to the power conferred."

Again, in the case of Martin v. Rushton, 42 Ala. 289, the Court, among other things, said:

"In cases like the present it is always to be borne in mind that these Acts of Parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters * * * Whoever considers the effect of this must see the consequences which frequently do happen to individuals. Property to which they have attached their whole fortunes and interests may be taken from them by an absolute

exercise of imperial power, and their whole circumstances
20 and situation in life may be entirely altered for a sum of money to be fixed by somebody else."

In Judge Cooley's Constitutional Limitations, at page 763, we find this language:

"So high a prerogative as that of divesting one's estate against his will should only be exercised when the plain letter of the law permits it. All grants of power by the Government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other, one judge saying 'an act of this sort deserves no favor; to construe it liberally would be signing against the rights of property.'"

The power of eminent domain was given the Authority "for carrying out the purposes of this chapter."

Now, what were "the purposes of this chapter"? Why, to build dams and impound water, and anything that does not help to carry out these purposes is not within the power of the Authority.

I would like to help the Authority accomplish its purpose in acquiring the 44,000-acre tract of land, and thus save the Government a considerable amount of money, but I cannot violate my conception of the Constitution and the law in order to do this. Far better that the Government should lose some money than deprive a single humble citizen of his individual right.

The Government has a simple way to add the lands in
21 question to the National Park area. All the National Park lands in North Carolina have been condemned by the state and turned over to the National Forest Service. If the lands in question are needed by the National Forest, then the state can condemn these lands and turn them over to the National Park Service. This would be a lawful way of obtaining the lands.

I might add here that, since the Authority began buying this 44,000-acre area, it has acquired by purchase already, as near as I can figure, something like 38,000 acres, and therefore it is not necessary for it to build a road of 40 or 50 miles from Bryson City to Deal's Gap. The lands in question lie only 5 to 8 miles from Bryson City, and the cost of a road to these lands would not be more than forty or fifty thousand dollars.

I am therefore compelled to conclude, as a matter of law, that the Authority has exceeded its powers in undertaking to condemn the lands in question, and that it has no constitutional or legal right to do so.

March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

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22 In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

Findings of fact

Filed March 17, 1945

The Court finds the following facts:

1. On June 8, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution, finding and determining that the condemnation of the property listed in the name of John Burns, et al., which is the subject matter of Docket No. 512, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933; as amended.

2. On April 25, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining that the condemnation of the property listed in the name of S. Columbus Welch, which is the subject matter of Docket No.
23 493, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933 as amended.

3. These determinations made by the Board of Directors of the Authority were made after the consideration of reports and recommendations presented to the Board by members of the Staff of the Authority, setting out the facts and circumstances surrounding the situation of the property involved, and were made in good faith.

4. Upon the dates of the filing of the petitions to condemn in these cases, the Authority was engaged in the construction of the Fontana dam and reservoir located on the Little Tennessee River in Western North Carolina.

5. Prior to the construction of this project, the state of North Carolina owned and maintained state highway 288, running along the north side of the Little Tennessee River from Deal's Gap, N. C., to Bryson City, N. C.

6. After the completion of the reservoir this road will be flooded throughout most of its length from the Fontana damsite to Bryson City.

7. The area of land lying on the northern side of the Little Tennessee River between the Fontana damsite and Bryson City, consisting of approximately 44,000 acres, has in the past had as its only means of access by road state highway 288, above referred to, and the roads connected therewith.

8. If this highway is flooded and not replaced, this entire area will be deprived of all road access, and will be accessible only by water or by foot trails.

24 9. In order to furnish road access to this area of 44,000 acres after the completion of the reservoir, it would be necessary to rebuild said highway 288 or its equivalent throughout most of its length.

10. The expenditure of this sum of money, and the materials, equipment, and manpower required would result in the furnishing of a road approximately equal in grades, widths, curves, and surfacing to highway 288, as it has existed in the past.

11. At the time of the beginning of the construction of the Fontana project this road was owned and maintained by the state, but it had originally been financed by bond issues upon which Swain County, N. C., was obligated.

12. When the representatives of the State Highway Commission of North Carolina, and of Swain County, were notified of the effect of the reservoir on this highway, they demanded that some action be taken to protect the state and the county.

13. During the negotiations it was suggested that one way of settling the problem would be to agree to the abandonment of the road, and for the Authority to purchase releases from individual land owners releasing the Authority, the state and the county from all liability for the loss of access.

14. While the question of the possible rebuilding of the road was under consideration, the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised.

25 15. The Authority made estimates to determine whether the area previously served could be acquired at a total cost less than the estimated cost of rebuilding the road. These studies

showed that the cost of the acquisition would be several hundred thousand dollars less than the cost of the road.

16. As a result of these studies and the attitude of the War Production Board, the Authority suggested to the State Highway Commission and to Swain county the method of settlement that was finally embodied in the contract which is in the record as Petitioner's Exhibit 8.

17. At the time this contract was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendations of its staff.

18. Upon the basis of such report and recommendations, the Board, on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority.

19. Pursuant to the terms of the contract, the Authority has already paid for the use and benefit of Swain county the sum of $400,000, and the state of North Carolina, in turn, under the authority of an act of the legislature, has paid $100,000 to the Authority on condition that that sum be used to assist in the acquisition of the land previously served by state highway 288.

20. The land owned by the respondent, S. Columbus Welch, which is the subject matter of Docket No. 493, is located on the north side of the Little Tennessee river approximately 13
26 miles from Bryson City, and approximately 15 miles from the Fontana damsite. Only a small portion of this land, approximately one and a half acres, will be below the level of the reservoir after it is filled. There will be no access to the remaining land by road in either direction. In order to furnish such access, it would be necessary to construct a road from Bryson City to the property. The cost of constructing such a road is estimated at between $450,000 and $500,000.

21. In determining to acquire this land, rather than to build the road required to furnish access, the Authority had before it, and considered, the estimates of the cost of the substitute road and the value of the land.

22. The land owned by the respondents, John Burns, et al., which is the subject matter of Docket No. 512, contains 82 acres located on the north side of the Little Tennessee river, approximately five miles from Bryson City and 20 miles from the Fontana damsite. No part of this land will be below the level of the lake created by the Fontana reservoir. After the reservoir is filled, there will be no access to this land by road in either direction. In order to furnish such access, it would be necessary to construct a road of a little over one mile in length, connecting this property with road outlets to Bryson City. The cost of constructing such

a connecting road has been estimated at $40,000, which greatly exceeds the value of the property.

23. Before determining to acquire the property of John Burns, et al., the Authority made a detailed study to ascertain the
27 cost of furnishing substitute access to this and adjoining properties, as compared with the cost of acquiring all of the properties in the area.

24. On the date of filing the petition to condemn the land the Authority was engaged in the construction of the Fontana dam, located on the Little Tennessee river at Fontana.

25. Prior to, and at the time of the construction, the state of North Carolina owned and maintained state highway 288, running along the north side of the Little Tennessee river from Deal's Gap to Bushnell, and then continuing along the north side of the Tuckaseigee river to Bryson City.

26. After the completion of the reservoir, most of said highway will be flooded from the damsite to within a few miles of Bryson City.

27. The area lying on the north side of said river between the Fontana damsite and Bryson City consists of approximately 44,000 acres, and in the past this area has used highway 288, together with certain connecting roads, as the only means of travel as an access road to said area.

28. The land owned by the respondents, John Burns and Julia Burns lies outside of the Fontana dam project, on the east border of the 44,000 acres, and is a very small portion thereof, adjoining private lands. Should highway 288 be covered by water from the reservoir, the only access road to said land would be an old cartway, laid off many years ago.

29. The resolution passed by the Board of Directors on June 8, 1944, was not necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933.

28 30. The lands described in the petition are not necessary to be condemned and taken over by the petitioner in order to carry out the purposes of said act, and the Authority has no power thereunder to acquire said land by condemnation.

31. The land owned by the respondent, S. Columbus Welch, referred to in the petition and answer as tract FR–1092, will not, with the exception of approximately an acre and a half, be submerged by water, and bears no physical relation to the Fontana project.

32. When the petitioner instituted this action and served the respondent, S. Columbus Welch, with process, said respondent, in due time, filed answer denying the right of petitioner to acquire tract FR–1092 other than that portion of same below the level of the reservoir, which said acre and a half, or whatever portion

of said tract would be flooded by the back waters of said dam, respondent in his answer agrees to convey by deed to the United States of America, and respondent further pleaded in his said answer the following:

"Respondent herewith agrees to execute a deed or instrument to the United States of America or the petition herein releasing, acquitting and discharging the Tennessee Valley Authority, its successors and assigns and its agents and employees and the United States of America, of and from all obligations, liabilities, claims, and damages of every nature, character, or description, whether now or hereafter existing, arising out of, or in any way connected with any loss, damage, interference, impairment
29 of the efficiency, value, usability or convenience of injury resulting to Tract No. FR–1092, and to any other property owned by respondent within the reservoir of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from or to be in any way connected with the construction of Fontana Dam or the creation or operation of Fontana Reservoir, including but not limited to:

"(a) The loss, destruction, and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the State of North Carolina and Swain County, North Carolina;

"(b) Loss, damage, impairment, interference, or injury to the property described in the petition, provided the petitioner does not take the land of respondent, other than tract No. FR–141 and that portion of tract No. FR–1092 actually flooded."

33. By amendment to answer filed by respondent in this cause, respondent pleaded the following:

"That in the event it becomes necessary for the United States Department of the Interior, the United States of America, or the State of North Carolina to acquire a right-of-way over any of the lands of the respondent set out and described in the petition as Tract No. FR–1092, for the construction and maintenance of a road or highway through and over any of said lands, this respondent hereby agrees to convey and grant unto the said United States Department of the Interior, the United States of America and/or the State of North Carolina such right-of-way over
30 and through said property as is necessary and required by the said United States Department of the Interior, the United States of America or the State of North Carolina, and this respondent here agrees and binds himself, his heirs, executors, administrator, or assigns to give, grant, and convey free of charge the aforesaid right-of-way over the aforesaid lands and agrees

that in the judgment entered by this court that such right-of-way be provided for."

34. The testimony of respondent Welch, taken upon the hearing of this cause, discloses that respondent is ready, able, and willing to execute the deed and release deed referred to in his pleadings.

35. Tract No. FR-1092, except that part of same lying below the level of said reservoir, bears no physical relation to the Fontana project, and is not necessary for the construction, operation or maintenance of the Fontana dam or anything connected with the Fontana project. The construction of a road or means of access to said tract of land is not required, and the furnishing of any means of access thereto is eliminated.

36. No part of said tract FR-1092 is taken by petitioner for public use, other than the acre and a half, or such portion as lies below the level of said reservoir, which said acre and a half, or said portion, respondent will convey to the United States of America.

37. The taking or attempted taking by petitioner of said tract FR-1092, other than the aforesaid portion lying below the level of said reservoir, is not authorized by the Congressional act creating the Tennessee Valley Authority.

31 38. I further find that John Burns and Julia Burns have agreed in their pleadings in this cause that they will not require the Authority, the State of North Carolina, or Swain County, to build or maintain any access road or roads to their lands, described as Tract FR-19, by reason of covering or flooding said highway 288 by the Authority, and I shall make this agreement a part of my judgment as to John Burns and wife. This agreement makes it unnecessary for the Authority or any one else to go to the expense of constructing a road to the lands of John Burns described in the petition.

This March 16, 1945.

E. Y. Webb,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Ashville Division

No. 526

United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, petitioner

v.

Fred Lollis, respondent

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, RESPONDENT

32

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, RESPONDENT

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, RESPONDENT

Findings of fact

Filed March 16, 1945

1. On July 26, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining that the condemnation of the property listed in the name of Philip G. Rust, which is the subject matter of Docket No. 549, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

2. On July 26, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining that the condemnation of the property listed in the name of Fred Lollis, which is the subject matter of Docket No. 526, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

3. On October 7, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determin-

33 ing that the condemnation of the property listed in the name of Arnold E. Bradshaw, which is the subject matter of Docket No. 548, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

4. On December 12, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining

that the condemnation of the property listed in the name of Abraham Cole Hyatt, which is the subject matter of Docket No. 570, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

5. These determinations, made by the Board of Directors of the Authority, were made after the consideration of reports and recommendations presented to the Board by members of the staff of the Authority setting out the facts and circumstances surrounding the situation of the property involved, and were made in good faith.

6. Upon the dates of the filing of the petitions to condemn in these cases, the Tennessee Valley Authority was engaged in the construction of the Fontana dam and reservoir located on the Little Tennessee river in western North Carolina.

7. Prior to the construction of this project, the State of North Carolina owned and maintained State Highway No. 288, running along the north side of the Little Tennessee river from Deal's Gap, North Carolina, to Bryson City.

8. This highway was a narrow, winding, dangerous mountain road, with unsufficient widths for modern traffic, and was concededly an inferior highway facility.

34 9. After the completion of the reservoir this road will be flooded throughout most of its length from the Fontana damsite to Bryson City.

10. The area of land lying on the northern side of the Little Tennessee river between the Fontana damsite and Bryson City, North Carolina, consisting of approximately 44,000 acres, has in the past had as its only means of access by road State Highway No. 288, above referred to, and the roads connected therewith. At the hearing of this cause it appeared that the Government had already acquired by purchase thirty to thirty-five thousand acres of the tract lying west of Noland's creek.

11. If this highway is flooded and not replaced, this entire area will be deprived of all road access, and will be accessible only by water or by foot trails.

12. In order to furnish road access to this area after the completion of the reservoir, it would be necessary to rebuild said State Highway No. 288 or its equivalent to the lands of respondents.

13. The building of a road from Bryson City to Deal's Gap would have cost approximately $1,400,000, and would have required the following quantities of equipment and materials and the following man-hours of work: 4 two yd. power shovels, 2 three-quarter yd. power shovels, 15 tractors, 4 scrapers, 2 rollers, 12 air compressors, 4 drilling outfits, 3 concrete outfits, 1 threshing outfit, 2,100 cu. yds. of sand, 3,350 yds. of aggregate, 5,050 barrels of cement, 13,000 lineal feet of concrete pipe, 450 tons of rein-

forcing steels 32,500 cu. yds. of stone surface, and 500,000 man-hours.

35 14. At the time of the beginning of the construction of the Fontana project this road was owned and maintained by the State, but it had originally been financed by bond issues upon which Swain county, North Carolina, was obligated.

15. When the representatives of the State Highway Commission of North Carolina and of Swain county were notified of the effect of the reservoir on this highway, they demanded that some action be taken to protect the State and the county.

16. During the negotiations it was suggested that one way of settling the problem would be to agree to the abandonment of the road, and for the Authority to purchase releases from individual landowners releasing the Authority, the State, and the county from all liability for the loss of access. This suggestion was rejected by the State and the county.

17. While the question of the possible rebuilding of the road was under consideration, the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised. The necessary equipment and materials could not have been obtained under the circumstances then existing without the active assistance of the War Production Board.

18. The Authority made estimates to determine whether the area previously served could be acquired at a total cost of less than the estimated cost of rebuilding the road. These

36 studies showed that the cost of the acquisition would be several hundred thousand dollars less than the cost of the road.

19. As a result of these studies and the attitude of the War Production Board, the Authority suggested to the State Highway Commission and to Swain county the method of settlement that was finally embodied in the contract which is in the record as Petitioner's Exhibit 8.

20. At the time this contract was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendation of its staff, as set out in Petitioner's Exhibit 10.

21. Upon the basis of such report and recommendations, the Board on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority.

22. Pursuant to the terms of the contract, the Authority has already paid for the use and benefit of Swain county the sum

of $400,000, and the State of North Carolina, in turn, under the authority of an act of the legislature, has paid $100,000 to the Authority on condition that that sum be used to assist in the acquisition of the land previously served by State Highway No. 288.

23. The Tennessee Valley Authority, the petitioner herein, has heretofore constructed a dam on the Little Tennessee river near Fontana for the purpose of impounding the waters of said river. It has heretofore acquired all lands necessary to be flooded by the waters of said river when impounded. The gates to said dam had been closed prior to the hearing of this action,
37 and the area comprising its reservoir is now in the process of being filled.

24. Prior to the construction of the Fontana dam and the impounding of the waters of said river, there was a state highway located on the north side of the Little Tennessee river and running parallel with the same from Deal's Gap (a point near the Fontana dam), to Bryson City, N. C., the same being designated and referred to as Highway No. 288. Said highway, while not hard-surfaced, was a gravel road constructed from the proceeds of a bond issue on the part of Swain county, and was maintained by said county until taken over by the State Highway and Public Works Commission of the State of North Carolina.

25. Located north of said highway and south of the present boundary lines of the Great Smoky Mountains National Park is an area comprising some 44,000 acres of land; none of which will be flooded by the impounding of the waters of Fontana dam.

26. The respondent, Philip G. Rust, is the owner of approximately 4,500 acres of land lying north of Highway 288, which said lands adjoin the southern boundary line of the present Great Smoky Mountains National Park. When the Fontana reservoir is completely filled, the high-water mark will be more than half a mile from the southern extremity of the Rust lands.

27. The respondent, Abraham Cole Hyatt, is the owner of approximately 256 acres of land lying north of Highway 288, which said lands adjoin the southern boundary line of the present Great Smoky Mountains National Park. When the Fon-
38 tana reservoir is completely filled, the high-water mark will be more than half a mile from the southern extremity of the Rust lands.

28. The respondent, Arnold E. Bradshaw, is the owner of two separate tracts of land lying north of Tuckaseegee river and Highway 288, and south of the present Great Smoky Mountains National Park. Said two tracts are a part of the 44,000 acres referred to in paragraph 3 above. Respondent Bradshaw resides on Tract FR-1020, consisting of approximately 136 acres, and uses the

same principally for farming purposes. This tract is located north of the high-water mark of the reservoir of Fontana dam, and none of said tract will be flooded.

29. Respondent Fred Lollis is the owner of approximately 230 acres of land lying north of Highway 288, which said lands adjoin the southern boundary line of the present Great Smoky Mountains National Park. When the Fontana dam is completely filled, the high-water mark will be more than half a mile from the southern extremity of his land.

30. In determining to acquire these lands, rather than to build the road required to furnish access, the Authority had before it, and considered, the estimates of the cost of the substitute road and the value of the land.

31. The greater portion of Highway 288 will be flooded by the waters of the Fontana dam.

32. There is located a state-owned public highway leading from the north of Noland's creek, where it connects with Highway 288, running up Noland's creek and into the present Great
39 Smoky Mountains National Park. This road has been used for a number of years by the residents and landowners residing on Noland's creek. This highway will not be flooded by the waters of the reservoir.

33. After Highway 288 is flooded, it would require the construction of only approximately six, or at the most eight, miles of road necessary to connect the lands in question with Bryson City, the county seat of Swain county.

34. The Authority has heretofore acquired title to all the lands located west of Noland's creek, with the exception of the North Carolina Exploration Company lands, which lands it does not seek to condemn.

35. The evidence offered by the petitioner as to the cost of replacement or relocation of Highway 288 had reference to the full length of Highway 288 from Deal's Gap to Bryson City. As shown by the maps, records, and evidence, it would be necessary to construct a road only some six to eight miles in order to reach the lands in question.

36. Some of the lands in question have been highly improved, in that various roads have been built over said lands, various modern residences have been located thereon, piped with running water, and furnished with electricity generated by Rust's privately owned power plant, and said Rust has extensively engaged in the growing of timber and the propagation of fish.

37. The lands sought to be condemned in this action are not sought to be condemned for any purpose or use connected with the building or maintenance of the Fontana project, nor
40 for any purpose for which the Authority is authorized by

the Acts of Congress to condemn lands. It is the declared purpose of the Authority, if the Court should permit said lands to be condemned, to convey them to the Department of the Interior, to become a part of the Great Smoky Mountains National Park.

38. In giving the Tennessee Valley Authority Act the most liberal construction which the Court could place upon the wording of the same, the Court would not be justified in permitting private property to be condemned when not needed for any use or purpose authorized by the Acts of Congress, and when said property is to be deeded by the condemnor for a purpose entirely foreign to that for which the Authority was created.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

41 SECTION C

In the District Court of the United States for the Western District of North Carolina

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, ET AL., RESPONDENTS

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, ET AL., RESPONDENTS

No. 526

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, ET AL., RESPONDENTS

Stipulation

Filed November 20, 1944

The parties to the above causes, acting through their attorneys of record, hereby stipulate and agree as follows:

42 1. For the purpose of the taking of evidence and hearing on the question of the right to condemn raised by the answers in each of said cases it is agreed that these three cases shall be consolidated and heard together.

2. It is further stipulated that on said consolidated hearing the evidence appearing in the transcript in the case of United States of America ex rel. Tennessee Valley Authority v. S. Columbus Welch, No. 493, and United States of America ex rel. Tennessee Valley Authority v. John Burns et al., No. 512, shall be treated as if offered anew as evidence in this consolidated hearing, and in the event of an appeal in any of these cases said evidence shall be incorporated in the record on appeal in proper order. The parties reserve the right to interpose objections to the competency and admissibility of any of said evidence and further reserve the right to offer any additional evidence that any of the parties may deem necessary.

WILLIAM C. FITTS, JR.,
Attorney for the Petitioner.

GEO. H. WARD,
Attorney for the Respondents.

43 In the District Court of the United States for the Western District of North Carolina

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, ET AL., RESPONDENTS

Stipulation

Filed December 30, 1944

The parties to the above cause, acting through their attorneys of record, hereby stipulate and agree as follows:

1. For the purpose of the taking of evidence and hearing on the question of the right to condemn raised by the answer filed herein it is agreed that this case shall be consolidated and heard with the cases pending under Docket Nos. 549, 548, and 526.

2. It is further stipulated that on said consolidated hearing the evidence appearing in the transcript in the case of United States of America ex rel. Tennessee Valley Authority v. S. Columbus

Welch, No. 493, and United States of America ex rel. Tennessee Valley Authority v. John Burns, et al., No. 512, shall be treated as if offered anew as evidence in this consolidated hearing and in the event of an appeal in this case said evidence shall be incorporated in the record on appeal in proper order. The parties reserve the right to interpose objections to the competency and admissibility of any of said evidence and further reserve
44 the right to offer any additional evidence that any of the parties may deem necessary.

THOMAS J. GRIFFIN,
Solicitor.

WILLIAM C. FITTS, JR.,
Attorneys for the Respondents.

JONES, WARD & JONES,
Attorneys for the Respondents.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

No. 526

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, ET AL., RESPONDENTS

45

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, ET AL., RESPONDENTS

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, ET AL., RESPONDENTS

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, ET AL., RESPONDENTS

Order

Filed April 7, 1945

This cause having come on to be heard on application of the parties for an order consolidating the above actions for purposes of appeal, and it appearing to the Court that the parties have stipulated that the above actions shall be consolidated, and it further appearing that the above actions involve common questions of law and fact and that their consolidation will serve the convenience of the Court and of the parties and will tend to avoid unnecessary costs and delay.

46 It is ordered, adjudged, and decreed that the stipulation of the parties filed in this cause on April 7th, 1945, be and the same hereby is approved.

It is further ordered, adjudged, and decreed that the above entitled causes be and hereby are, for purposes of petitioner's appeal only, consolidated into one action in this Court and that the orders and proceedings heretofore had in said causes respectively are hereby made orders and proceedings in this cause and that the consolidated cause proceed under the title United States of America, upon the relation and for the use of the Tennessee

Valley Authority v. S. Columbus Welch, et al., No. 493, consolidated cause.

Done this 7th day of April 1945.

E. Y. WEBB, *Judge.*

O. K.

THOMAS J. GRIFFIN,
Attorney for petitioner.

MCKINLEY EDWARDS,
Attorney for respondents in No. 493.

B. C. JONES,
Attorney for respondents in No. 512.

GEO. H. WARD,
Attorney for respondents in Nos. 526, 548, 549, and 570.

47 SECTION D

TESTIMONY BEFORE THE DISTRICT COURT

ROBERT E. FRIERSON, for Petitioner

ON DIRECT EXAMINATION

Q. You are employed by the Tennessee Valley Authority, are you not?

A. I am.

Q. And what is your present position?

A. I am Senior Civil Engineer in charge of the Land Purchase Control Section of the Maps and Surveys Division.

Q. How long have you occupied that position?

A. About ten and a half years.

Q. Will you describe in general the duties of that position?

A. Under the general policies established by the Board, to determine the extent of lands required for the various reservoir projects [tr. 57].[1]

* * * * *

Q. What part did you take, if any, Mr. Frierson, in determining what land was to be acquired in the Fontana Reservoir area?

48 A. Well, I'm in charge of the section of the Maps and Surveys Division that determines the extent of land requirements for the reservoir project.

[1] With the exception of the testimony of Mr. Frierson on pp. 57–60, infra, all of the testimony herein is from the transcript in the Welch and Burns cases. As used herein "tr." refers to the paging of the transcript in Volume II of the record. This does not correspond to the paging in the reporter's original transcript.

Q. What type of studies or investigations did you make in that area?

A. Well, our division makes a detailed property map of each tract of land affected, and with copies of those maps and aerial photographs in hand, representatives from my section inspect the reservoir tract by tract, and then I secure information on the behavior of the water after impoundage from the hydraulic engineers, estimates of various road costs from the highway engineers, estimates of land value from the appraisers of the Land Acquisition Department——

By the COURT:

Q. Did you say road costs, Mr. Frierson?

A. Estimates of road cost for providing access to various parcels of land.

By Mr. FITTS:

Q. Mr. Frierson, without stating any detail yet about this, just tell me what that is and whether it was prepared by you [handing map to witness].

A. It is an area map of the Fontana Reservoir project, prepared under my supervision and direction.

Q. Well, now does that accurately represent what it purports to represent?

A. It does.

Q. And you are so testifying?

A. Yes, sir.

49 Q. Is that correct?

A. That's correct.

Mr. FITTS. We will offer in evidence as Petitioner's Exhibit No. 3 the map referred to by the witness, which is entitled "Fontana Reservoir Area, Showing Pool at Elevation 1723." I am offering it now and then I will let the witness explain what it purports to show [tr. 59–61].

* * * * *

Q. Mr. Frierson, there are some other properties shown on this map, Petitioner's Exhibit 3. The ones on the north side of the river that are in this cross-lined yellow and brown, what is that property?

A. That's land which the Authority is acquiring and plans to turn over to the Park Service [tr. 62–63].

* * * * *

Q. Now, where on this map is shown, if at all, the course of State Highway 288 through that area?

A. It's on the north side of the river, north side of the lake, and is shown in red everywhere it is below the pool. Where it is above the pool it's in a double line, very small.

Q. But wherever on the map that red line meandering along the northern side of the lake appears, that's the highway where it would be under water. Is that correct?

A. That's correct.

* * * * *

Q. Mr. Frierson, before offering it I would like to have you tell us what this exhibit is which is labeled "Aerial Photo-
50 graphic Mosaic, Fontana Reservoir Area," and who made it up [handing document to witness].

A. It's an aerial photographic mosaic of the Fontana Reservoir. That is, it's an aerial photograph matched together in a composite picture of the entire reservoir area. It was made in my office under my supervision and direction [tr. 63–64].

* * * * *

By the COURT:

Q. Let me ask him this question. All the areas mounted with red in that exhibit, Mr. Frierson, are the contested lands in this suit?

A. They were the lands which I understood were being contested [tr. 65].

* * * * *

By Mr. FITTS:

Q. Will you explain any markings on that mosaic that have not been explained?

A. The blue line shows the outline of the reservoir pool after impoundage.

* * * * *

A. The orange line shows the boundaries to which the Tennessee Valley Authority has purchased or is attempting to purchase [tr. 66].

* * * * *

Q. Now Mr. Frierson, taking up again Petitioner's Exhibit 3, the colored map, I wish you'd look first at the John Burns property, and I want to ask you whether or not you or those working under your direction participated in any study or investi-
51 gation designed to determine whether that property could be left out of the acquisition program [tr. 67].

* * * * *

A. Yes, sir; I made such a study.

Q. What did you do?

Mr. EDWARDS. Object.

The COURT. I will let him answer that.

A. I secured, or requested from the Land Acquisition Department and secured estimates of values of not only the John Burns property but all of the properties in the Peachtree Creek Valley, to see whether or not——

The COURT. That includes the Columbus Welch tract?

Mr. FITTS. No, sir; it's in a different area. This study is on the area where the John Burns property is.

The COURT. All right.

Q. Go ahead, sir.

A. To see whether or not a road could be constructed into the Peachtree Creek Valley at a price less than or equal to the value of the properties which the road would serve. In the Peachtree Creek Valley there, there were some ten or fifteen tracts of land that contained about 1,200 or 1,220 acres.

By the COURT:

Q. You are still talking about the Burns tract now?

A. Just the Burns tract. It is the only tract that was——

Q. The eighty-two-acre tract; all right.

A. But there were some eight or ten other properties in that valley.

52 Q. Since that time you have acquired those, haven't you?

A. Yes, sir.

Q. Got all except the Burns tract in there?

A. Yes, sir.

Mr. JONES. I think you have it incorrect, Your Honor. There is one tract that is not in there. I know you haven't paid for it.

The WITNESS. Well, I will answer that so far as I know.

Mr. JONES. That's all right, as far as you know.

By Mr. FITTS:

Q. Go ahead, sir.

A. There were some 1,220 acres in there and the estimated value of it was around $23,000, all the land in the valley. One road would serve all of the land. If we get a road in there, it would serve all the properties in the valley. But the estimated cost of providing this road over the high ridge between Lands Creek and Peachtree Creek was $40,000.

By the COURT:

Q. That was before you acquired these 1,200 acres, wasn't it?

A. Yes.

Q. Since that 1,200 acres was acquired, what would be the necessity of the road?

A. There would be no necessity for the road except for the one tract.

By Mr. Fitts:

Q. What would be the situation of the John Burns tract—let's get right to that—if no road were built to it and that tract were not acquired?

53 A. It would be completely isolated [tr. 69–71].

* * * * *

Q. Is there any way in or out, after the reservoir?

A. No way by road.

Q. And what would it take, physically, to get a road?

A. It would require a little over a mile of road, estimated at $40,000.

Q. $40,000 you testify it would take to provide access to this one piece of isolated property. Is that correct?

A. That's correct [tr. 72].

* * * * *

Q. Mr. Frierson, will you look at the S. Columbus Welch property on the colored map and tell us whether any study or investigation was made by you to determine whether it was economically feasible to give road access to that property after the reservoir was up?

A. No special study was made of that. It was so far away from where the roads were above water that it would have taken, it was apparent, it was obvious, that the road costs would be many, many times the value of the property, so no detailed study was made of that particular case.

Q. Well, as that property is situated physically, what would be required in order to give any access by road?

A. Well, it would take some twelve to thirteen miles of road on the north side of the reservoir from the Bryson City end of 288, at an estimated cost of between $450,000 and $500,000. I haven't added those up exactly [tr. 74].

* * * * *

54 ON CROSS-EXAMINATION

Q. Mr. Frierson, how far is this tract of land of Welch's from the dam site?

A. It must be fifteen or twenty miles.

Q. Well, you will admit that the only reason the petitioner in this case should want this tract of land is on account of the question of a road to it?

A. No, sir.

Q. What?

A. No; I wouldn't admit that.

Q. You won't admit that? Well, now I'll just go fishing with you a little here. What else do they need it for?

A. Well, there are other reasons for acquiring private ownership islands inside of government lands besides the mere question of access.

Q. All right, now come back down to this. In the construction of the Fontana Dam they don't need one foot of this land?

A. That's——

Q. Except the part that it floods, about an acre.

A. That's a question of opinion.

Q. What?

A. That's a question——

Q. I am asking you, now let me get down to the facts. They don't need a stick of timber that is on it to put in the construction of the dam, do they?

A. I don't know. I didn't construct the dam.

Q. Well, the dam's already built?

A. It's being built.

55 Q. Well, isn't the concrete poured, finished?

A. No.

Q. How much do you know about that business down there? When were you down at Fontana last?

A. Oh, about six months or a year ago, between six months and a year.

Q. Oh. Well, don't you know that they've about finished work down there?

A. It isn't finished.

Q. All right, now, Mr. Witness, can you tell this honorable Court any part of that land except the one acre or more that's flooded that is of any necessity whatever to the construction of the Fontana Dam project?

A. Are you limiting that to the construction?

Q. Absolutely. That's what my question was.

A. No; it isn't necessary for the construction.

Q. No. Well, now let's just be frank and fair about it, Mr. Witness. I will ask you again if you want to admit to this honorable Court that the only purpose and reason for the Tennessee Valley Authority, the petitioner in this case, to take this Welch tract of land, is on account of closing his access road to it.

A. No, I wouldn't—I wouldn't say so.

Q. What?

A. Not entirely so.

Q. Well, all right, please tell us what else they needed it for?

A. Well, let me explain briefly that to leave——

Q. I've left the gap wide open to you; you can explain anything you want to.

56 A. Well, go ahead and talk.

Q. But I want you to answer my question. What else do they need it for?

A. Well, you let me explain it in my own words.

Q. Well, the proper way, Mr. Witness—let me help you a little—is to first answer and then explain.

A. Well, you asked——

Q. Well, I'll be fair with you. You can go either way you want to.

A. I thought your question was to explain what they need it for.

Q. All right; we'll let you do that—if you you can.

A. All right. An island of private ownership in government land is undesirable for a good many reasons. In acquiring land for a large project like this, there's a certain amount of land that the government gets that is not flooded, and to leave one little parcel of privately owned land inside of a large body of government land would be uneconomical, hard for management, fire control, policing, it would require marking of the boundaries to keep the government from encroaching on the private land and the private owner from encroaching on the government land; and if the Authority ever wanted to lease the property, cut timber or plan some recreational development on it, or any purpose for which it may want to use a block of land which it had acquired from the various owners there, here would be this small island ownership in the middle of it which would create a problem on any type of development they may choose to make on it [tr. 94–97].

57 ON DIRECT EXAMINATION

Q. Mr. Frierson, is this the same map as the one you testified concerning in the S. Columbus Welch case with certain additions?

A. It is.

Q. What are those additions that you have put on this map?

A. I've added on this map some eight or ten additional properties—the Bradshaw properties, Lollis properties, Philip G. Rust and Abraham Cole Hyatt properties [tr. 10].

* * * * *

Q. And before TVA came into that area—before TVA started the construction of the Fontana Dam, what was the means of access to and from the Rust property?

A. It was down the road along Nolands Creek to Highway 288; thence out along Highway 288.

Q. Now if Highway 288 were flooded out and not replaced—no substitute built for it—would there be any way in or out of that property by road?

A. No.

Q. Would there be any way to get in or out of it without going over other Government-owned land?

A. No, sir.

Q. Did you make any kind of study or survey to determine the feasibility of building substitute road access into that property?

A. Yes; it would require that portion of the relocated
58 Highway 288—or the proposed relocated Highway 288—from up near Lands Creek to Nolands Creek, which was estimated at about $330,000.

Q. In other words, your best judgment on the basis of that study is that it would cost something over $300,000. Is that correct?

A. Yes; that's right.

Q. With respect to the Lollis property, is that adjoining the Rust property?

A. Yes; it adjoins the Rust property on the southeast.

Q. How many acres in this tract, approximately?

A. There are 194 acres in the Fred Lollis property.

Q. Is the road situation and the access situation substantially the same on the Lollis and Rust properties?

The COURT. Yes; I imagine so except the Lollis's is a little nearer Bryson City.

A. That's corect.

Q. How many acres in the Hyatt tract?

A. 206 acres. Well, there are two tracts. 206 in one and 21 in the other.

Q. Is there any difference in the road situation?

A. It's a little further from Bryson City than the Rust property.

Q. Probably essentially the same?

A. Yes, sir.

Q. There are four of those Bradshaw tracts?

A. Yes.

Q. Just for the record, do you have the acreage of each of those tracts?

A. Yes.

Q. All shown on the map?

59 A. Yes. On tract 1024, which is up on Nolands Creek, there is 18 acres. On Tract 1020 which is up on Hickory Flat Branch there is 113 acres. On Tract 1006 which is up on Peachtree Creek there's 16 acres. Tract 1007 is also up in the Peachtree Creek Valley and it has 111 acres.

Q. With respect to those Bradshaw tracts, is the road situation essentially the same?

A. Yes, sir.

Q. Just as you have described for the others?

A. That is correct.

Q. Now, so there will be no misunderstanding, none of these tracts will be flooded by the Fontana Reservoir?

A. No; none of them.

Q. They would all be isolated and without road access unless substitute roads were built into them? Is that correct?

A. Yes.

Q. Anybody living at present on these tracts, Mr. Frierson?

A. They have all moved out except someone is living on the Bradshaw tract up on Flat Branch—that is 1020—and there is a tenant up on the Hyatt tract.

Q. There are people living on the Rust tract, aren't there?

A. Yes; on the Rust tract.

By the COURT:

Q. That's the big tract?

A. Yes, sir.

Mr. FITTS. For the record, Your Honor, I would like to
60 offer as Petitioner's Exhibit No. 4 the mosaic—the aerial picture that we had in the other record as Petitioner's Exhibit No. 4.

(Above described photographic mosaic was received in evidence and marked "Petitioner's Exhibit No. 4.")

By Mr. FITTS:

Q. Mr. Frierson, looking at Petitioner's Exhibit No. 4 for just a minute, have you made any changes on that?

A. We've added these four additional ownerships.

Q. You've just added the outlines of the additional ownerships?

A. Yes. [tr. 11–14.]

FRANK W. WEBSTER, for Petitioner

ON DIRECT EXAMINATION

Q. And what is your present position with TVA?

A. I'm the head of the Highway Division of the TVA.

Q. And how long have you held that position?

A. Since September 20, 1934.

Q. Will you describe generally the duties of that position?

A. The duties of that position require the location and design of access roads to the Authority's dams, further require the study of the effect of the various reservoirs on state and county roads, the preparation of a general plan of highway replacements, discussion with the government agencies owning the roads of the reservoir effects and the proposed replacement plans, and negotiations with these agencies, state and county, looking toward a contract for relocations which must be approved by the Board of Directors.

61 Q. In how many of the reservoirs constructed by TVA have you been responsible for the road relocation and readjustment work?

A. In seventeen.

Q. Can you give us your best estimate as to the total amount of money that has been expended in those relocations under your supervision?

A. Approximately $34,000,000.

Q. And how many states and counties have you dealt with in these various reservoirs?

A. I've dealt with six states and forty-four counties.

Q. In determining what roads are to be replaced or relocated and what roads are to be abandoned in a particular reservoir, what factors are taken into consideration?

A. The service to the people living in the immediate reservoir area, the service to people living in areas adjacent thereto, and considerably removed, as a through road proposition, and the use to which the land can be put, particularly for agricultural purposes.

Q. In situations where the flooding of roads will result in depriving landowners of access to their property, what alternative methods are considered of dealing with the problem?

A. First, the replacement of a road to provide substitute access. Second, the purchase of the property itself in fee simple. Third, the purchase of releases for impairment of access, or payment for impairment of access, together with releases to the TVA and to the owner of the road.

62 Q. In general, in deciding between those possible alternatives, what factors are taken into consideration?

A. The value of the road to the people who live in the area and to other people adjacent to the area, and the cost of the road.

Q. Now are you generally familiar with the area of land lying between the northern edge of the Fontana Reservoir and the present southern boundary of the Great Smoky Mountains National Park, which area extends roughly from Fontana Dam on the west to Bryson City on the east?

A. I am.

Q. Approximately how many acres are included in that area?

A. Approximately 44,000 acres.

Q. Prior to the beginning of the Fontana Dam, about how many families resided in that area?

A. Approximately 216.

Q. Prior to the beginning of the construction at Fontana Dam, by what road facilities was that area served?

A. It was served by State Highway 288 and connecting county roads, county type roads.

Q. Now between what points did this State Highway 288 run, and what was its total length?

A. It ran from Bryson City to the Tennessee state line at Deals Gap, and it was approximately fifty miles long.

Q. Will you describe the nature and type of this road before the reservoir, with reference to the type of construction, its width, grades, curves, surface and general condition?

63 A. The road was located through very rough country. It followed closely the contours of the steep mountains that exist there; it was very narrow, approximately sixteen feet wide exclusive of ditches; it had very sharp curves; it had a thin surface of macadam about fourteen feet wide, and I would say that it was unsafe for two cars to pass except at moderate rates of speed. In other words, it was a very narrow, crooked, dangerous road.

Q. Was this a state or county road?

A. It was a state road.

Q. Within what county was it located?

A. Swain County.

Q. Will this road be flooded by the Fontana Reservoir?

A. It will.

By the COURT:

Q. All of it?

A. No, sir, twenty-seven and a half miles, approximately.

By Mr. FITTS:

Q. Will it be flooded in such a way that it is not usable as a road?

A. Yes, sir.

By the COURT:

Q. That is, the twenty-seven and a half miles?

A. Well, the whole thing. You couldn't use any of the road for any purpose except about two miles next to Bryson City. That would be a stub.

By Mr. FITTS:

Q. And that's because it's cut into pieces?

64 A. That's right. It's cut into pieces by the arms of the reservoir.

Q. Flooded at different segments along the road?

A. That's right [tr. 106–111].

* * * * *

Q. Assuming that the reservoir were permitted to flood this road and nothing whatever were done about it, what would be the

situation of this area that you have mentioned, with resepect to access?

A. It would be completely isolated so far as road access is concerned.

Q. What would be required for any substitute access roughly equivalent to the access provided by Highway 288?

A. The construction of a road approximately parallel with the Fontana Reservoir, extending from a point near Fax Branch to a point two or three miles west of Bryson City.

Q. (Handing document to witness.) Mr. Webster, will you look at this map which is designated "Highway and Railroad Relocations, Fontana Reservoir," and tell me first whether that was prepared by you?

A. It was prepared under my supervision.

Q. And does it accurately show what it purports to show?

A. It does [tr.111–112].

* * * * *

Q. Mr. Webster, will you take it, please sir, and explain what it shows?

A. This map shows the Fontana Dam and Fontana Reservoir——

65 The COURT. Shows what?

A. Shows Fontana Dam and Fontana Reservoir. And it shows the area between Deals Gap and Bryson City on the north side of the Little Tennessee River. It also shows in green those portions of State Highway 288 which will be flooded by Fontana Reservoir, in green, down inside the reservoir line, down in the river.

Mr. FITTS. Inside the water.

By the COURT:

Q. What does it mean?

A. That shows the parts of Highway 288 which would be flooded. Now the red shows the parts of 288 which would have had to have been rebuilt if a relocation had been made.

By Mr. FITTS:

Q. In other words, the red is the road that you would have to build to take the place of 288?

A. That's right. And it shows in blue the parkway.

By the COURT:

Q. How long is that road that you've got marked in red? How long would it have to be?

A. Thirty-two miles.

By Mr. Fitts:

Q. Mr. Webster, what is your best estimate of the cost of furnishing that substitute access to take the place of Highway 288?

A. $1,400,000 [tr. 112–113].

* * * * *

Q. And what is your best estimate, Mr. Webster, as to the
66 types and amounts of construction equipment, materials and supplies that would have been required for the construction of that substitute road?

A. Assuming a construction period of one year, I estimate it would have required four two-yard power shovels, two three-quarter yard power shovels, fifteen tractors, four carryall scrapers, two sheepsfoot rollers, twelve air compressors, four drilling outfits including wagon drills, jack hammers, and so forth, three concrete outfits including mixers, rollers, conveyors, pumps, vibrators, hoists, saw reels, and so forth, one thrashing outfit including a screening plant. I estimate the materials required at 2,100 cubic yards of sand, 3,350 yards of coarse aggregate, 5,050 barrels of cement, 13,000 lineal feet of concrete pipe, 450 tons of reinforcing steel and 32,500 cubic yards of crushed stone surface.

Q. Well, now, Mr. Webster, could that equipment and material have been procured without preference ratings and priority assistance from the War Production Board?

A. No, sir.

Q. Did you have any assurance that such preference ratings could have been obtained?

A. No, sir.

Q. What is your best estimate as to the number of man hours that would have been required in that construction?

A. 500,000 man-hours.

Q. If such substitute access had been built, at the cost that you have outlined, what type of facility would have been ob-
67 tained, with particular reference to width, grade, curves, surfacing and general conditions? If you spent all that, what would you have?

A. You'd have a road graded to a width of eighteen feet exclusive of ditches; it would have been very crooked, curves as sharp as fifty-foot radius, sight distance as low as 150 feet; would have had a surface of macadam, thin macadam surface about three inches thick.

Q. What would it take to get a really good road in there? Have you got any idea?

A. Yes, I——

The Court. I don't expect you could get a very good road in there.

A. You could probably get a road comparable to this parkway, I'd call that a pretty good road, although very crooked, for between three and four million dollars.

By the COURT:

Q. You are just talking about what it would cost to build one as good as the state had down there?

A. That was $1,400,000.

By Mr. FITTS:

Q. $1,400,000 to get one just like the state had, or as close to it as we could get. In attempting to reach a solution of this road problem arising out of the construction of the Fontana Dam and reservoir, did you deal with the State of North Carolina or with Swain County or with both?

A. Both.

Q. What was the interest of the state in this matter?

Mr. EDWARDS. Object.

68 The COURT. Well, I believe I will sustain the objection. We know what the interest of the state is. It's a state road.

Mr. FITTS. All right, your Honor.

Q. Mr. Webster, in the negotiations, what was it that the state insisted upon?

Mr. EDWARDS. Object.

Mr. FITTS. Now, Your Honor, that's a question of what actually happened.

The COURT. I will let him answer the question.

Mr. FITTS. He was there.

A. The state insisted that we take the interest of Swain County, as far as obligations would permit, that we purchase, that if Highway 288 were not rebuilt, that we purchase all the property in fee simple which used that road for access, and that we make a substantial payment to Swain County within the limits of our legal liability, to reimburse them partially for their bonded indebtedness in building that road.

Mr. EDWARDS. Respondent Welch objects to the answer and moves to strike it out.

The COURT. Let it be overruled.

Q. In these negotiations, Mr. Webster, what alternative solutions were considered?

A. One alternative was to purchase all of this property in fee simple and apply the difference between the cost of this property and the estimated cost of relocating 288, to building a road on the south side of the river between Fontana Dam and Bryson City.

This was rejected by the state because of the fact that it
69 wouldn't protect the interest of Swain County, they wouldn't get anything out of it at all since this road would be in

Graham County, and also because the amount of money left over after buying the land would have been so small that it wouldn't have gone very far on a road.

Another alternative considered was for the TVA to purchase this land and turn it over to the state, who would hold it as a sort of a bargain matter with the Park Service until the Park Service was actually able to build the road. The TVA Board turned that down.

A third alternative was to purchase the land as it was finally agreed, and to pay Swain County only $200,000. This was rejected by the state at the insistence of Swain County.

Q. Well, now what was the position of the State——

Mr. EDWARDS. Object.

Q. In their negotiations with you, in reference to any alternative that left this area in private ownership without road facilities?

The COURT. I will permit that question to be answered over objection, Mr. Edwards. I am not sure whether it really bears on the question of law in this case or not, but I will hear it.

Mr. EDWARDS. Very well, Your Honor.

A. The state insisted that we must purchase all of this land in fee simple if the road was not replaced.

Q. Was a contract finally agreed upon?

A. Yes.

Q. (Handing document to witness.) Are you familiar with the document?

70 A. Yes, sir.

Q. Is that a correct copy of the contract as agreed upon?

A. Yes, sir; it is.

Q. It is also certified as a correct copy by the Assistant Secretary of the Authority?

A. Yes, sir [tr. 114–119].

* * * * *

By the COURT:

Q. Now Mr. Webster, what was your agreement with the park people?

A. That contract provided that the Authority would purchase all of this land between Twenty Mile Ridge on the west and the ridge between Peachtree Creek and Lands Creek on the east.

Q. That's the 44,000 acres?

A. Yes, sir. And between the park line on the north and Fontana Reservoir on the south, except certain mining interests. There was one mine excluded, Fontana Copper Company, I believe. After the purchase of this property, the Authority was to turn this property over to the National Park Service, for a considera-

tion. A consideration was set up in the contract that the National Park Service——

Q. What were they to pay for it?

A. Well, they were to build a road.

Q. You mean the park people?

A. As soon as Congress would appropriate the funds, they were to build a road extending through this area and being a part of their park road service.

Q. Is that the only consideration they paid the TVA?

71 A. They weren't to pay the TVA anything, just to build that road.

Q. In other words, the TVA, after acquiring this 40,000 acres, was to deed it to the Park Service free?

A. That's right.

Q. And the Park Service wasn't to pay anything for it at all except to build a road?

A. Yes, sir.

Q. Where was that road from?

A. That road was to start down near Fax Branch, a few miles below Fontana Dam or west of Fontana Dam, and was to extend approximately parallel with the reservoir on the north side.

Q. Parallel with what?

A. With the Fontana Reservoir, to a point two miles west of Bryson City or to the boundary of the park line.

Q. That was to go through this 40,000?

A. That's right. Well, it was to extend really into Deals Gap.

Q. Would it cut through or cross this 160 acres of land belonging to Columbus Welch?

A. I doubt it. It's never been finally located, but I don't think it would.

The Court. Very well.

By Mr. Fitts:

Q. Mr. Webster, what were the compelling reasons in the negotiations for abandoning the alternative of rebuilding Highway 288?

A. Well, one was the saving of critical materials and manpower during the war. The second was to provide a means by
72 which the state and the region might ultimately get a good road, a road with reasonable alignment and sight distance and fairly safe.

By the Court:

Q. You mean this road the park was to build?

A. Yes, sir; whereas this road the TVA would have built to replace 288 wouldn't have been much better than this present road, which isn't much good for the traveler.

By Mr. FITTS:

Q. What were the compelling reasons why the alternative of leaving this whole area just outstanding in private ownership, without the construction of any roads, was rejected?

A. Well, the state and county and the TVA didn't—at least the state and the TVA; I'm not sure about the county—were not willing to leave this road—to leave this property without access, because of the fact that you couldn't get the law enforcement agencies' personnel, health and medical personnel——[tr. 121–124].

* * * * *

Q. Did you finish that answer, Mr. Webster?

A. Yes, sir; I think I did. No, there's one other point, that Swain County wouldn't have had any aid in reducing her bonded indebtedness under such a plan [tr. 125].

* * * * *

Q. Mr. Webster, in your opinion what are the advantages, if any, of the method of settlement of this road problem that was finally agreed upon? [tr. 127].

* * * * *

73 A. In the first place, this settlement disposed of the problem of providing access to these areas. In the second place, it made possible the ultimate construction of a good road that would have been serviceable to through traffic.

By the COURT:

Q. You mean the park road?

A. Yes, sir. If we had gone on and built that road as it was, it would never have been of much or any value to either the State of North Carolina or Tennessee or the country, anybody except the people that lived right in it. It was too narrow and crooked to be of much use for a through road.

Q. There are no people living in that 44,000 acreage?

A. Not now, but this was before this was settled.

Q. This good road that would be built by the park people would be built after the war was over and if Congress appropriated enough money to do it, which you think will be about three million dollars?

A. My point is that if we had gone on and built this road as a replacement, it wouldn't have been much, if any, better than what we now have, and it would probably have made this whole idea of getting a good road impossible.

Q. I see the point. I think you gentlemen acted with the very finest motives and my heart is absolutely with you, but the question worrying me is whether or not, under all these circumstances,

you can go and take a man's land away from him when the project under which you are operating doesn't need it for project
74 purposes, just because you want to give it to another branch of the government or turn it over to the state, or just because you don't want to build a road. Anything else?

A. Well, the third advantage, as I see it, it helped Swain County out. It gave Swain County $400,000 [tr. 128–130].

* * * * *

A. Another advantage is that it greatly added to the value and worth of the National Park, by getting this land and extending its borders down to the lake.

By Mr. FITTS:

Q. Mr. Webster, will you look at this Petitioner's Exhibit 3, the Fontana Reservoir area map. You see on that map the property listed in the name of S. Columbus Welch that we have been speaking of?

A. Yes, sir.

Q. With the reservoir impounded, what would be the situation of that property physically with respect to access, if it is left in private ownership?

A. Be isolated [tr. 130–131].

Q. What physically would be required to provide a substitute means of access to that property?

A. The construction of a new road extending from that property parallel to the lake and above the reservoir into Lands Creek.

By the COURT:

Q. That's the red marking you showed us in the other map?

A. Yes, sir; it's most of that. It stopped where that red
75 line crosses the road at Lands Creek. You wouldn't have to go quite as far, but that's most of it. Then from Lands Creek you could travel over a county road by Franklin Grove Church.

By Mr. FITTS:

Q. What is your best estimate of the cost it would require?

A. Well, that would require thirteen and four-tenths miles of land [sic], and using the same width as U. S. State Highway 288 we estimated it would cost $600,000, using that same type of road.

Q. Now on Petitioner's Exhibit 3, Mr. Webster, can you locate that John Burns tract we have been talking about?

A. Yes, sir.

Q. Well, after the reservoir is impounded, will that tract have any access?

A. As far as I can see and know, it won't, by road.

Q. What physically would be required to give it a reasonable means of access?

A. Construction of a new road extending from Lands Creek across a high ridge into this property, extending in a westerly direction. The road would be about one mile long. The estimate of our highway engineers on the cost of it was $40,000.

Q. Was that, in your opinion, a reasonable estimate?

A. It was [tr. 131–132].

CHARLES ROSS, for Petitioner

ON DIRECT EXAMINATION

Q. Do you have any connection with the State Highway Commission of North Carolina?

76 A. I am General Counsel of the Commission and Acting Chairman.

Q. Did you have any connection with the Commission at the time that the contract between the TVA and the state regarding Highway 288 was negotiated?

A. Yes, sir; I was General Counsel of the Commission at that time.

Q. Did you participate in the negotiations for consideration of the problem?

A. Yes, I did. The direct negotiations with TVA officials were conducted by a Mr. Farrabee, our Division Commissioner, and then the results of his negotiations were relayed to me and I in turn handled them with the Highway Commission.

Q. Did you keep informed of the problems which were arising and the solutions which were being discussed?

A. Yes; I was kept informed by Mr. Farrabee at each time of his negotiations and various things. I conferred with Mr. Farrabee and also with Mr. Walker, our Division Engineer here in this territory.

Q. Now insofar as the flooding of State Highway 288 was concerned, what was the state insisting should be done?

A. Well, the matter of two solutions of that problem had been considered by the Commission for—oh, back for a good many years. In fact the question was first brought up and discussed within the Commission back before the TVA became interested, when the Fontana Dam was a project of the Nantahala Power Company.

One solution of the problem was the relocation of 288 above
77 the pond level, reconstruction at the expense of the power company, or later of the TVA. An alternative proposition that was considered from time to time was the acquirement of all the lands within the area and the conveyance of that land to the

Park Commission—I mean to the Park Service. That was suggested because of the fact that the original proposed boundary of the Great Smoky Mountains National Park, the original act of Congress and the original act of the North Carolina legislature in 1927 called for the southern boundary of the Smoky Mountain National Park to be along the Little Tennessee River, but later in the acquirement of that property the cost of it was greater than the state had contemplated and there was about 40,000 acres eliminated and the park boundary was moved north and the Federal Government finally by an amended act of Congress agreed to accept the Smoky Mountain Park and put it under control without that land, but that had remained as a sort of intangible obligation to the state through the years. The local people of Swain County that we wanted to be entirely satisfied with whatever arrangement we made were always insistent that the road should be reconstructed, and the Highway Commission was never disposed to override the wishes of Swain County in the matter and provide for the elimination of the road. It finally came to the point that we were advised by TVA that it was impossible for them to procure the necessary priorities for the construction of the road during the war period, and the alternative proposition then of buying the land, eliminating private ownership, the proposition came back to us from the TVA, and over a period of con-

78 siderable time the negotiations between the Highway Commision on the one hand and the TVA on the other and Swain County and the National Park Service was conducted until it developed that——[tr. 143–145].

* * * * * *

Q. Mr. Ross, had you finished your answer?

A. Well, I was going along with the history of the negotiations. Finally it was represented to the Highway Commission that the maximum amount of money that the TVA were willing or could legally put into the proposition was the estimated cost of the replacement of 288, and that the Swain County Board of Commissioners were unwilling to approve the elimination of 288 unless they could be paid the sum of $400,000. It was represented to us that the TVA maximum contribution, that is by purchase of the lands, would leave them only $300,000 that they could turn over to Swain County. Thereupon I took the matter up with the Governor and Council of State and asked if the Governor and the Council of State would be willing, if they had legislative authority to do so, to participate in the cost of the land to the extent of $100,000, as that seemed to be the amount that was short in order to meet these obligations, upon condition that the land would be turned over to the United States Park Service and that the

boundary line of the Great Smoky Mountain Park would be extended to the shore line, and upon the further agreement that the Park Service would, insofar as they were legally able to do, obligate to build a road which their plans showed as being a
79 part of their development of the park, that would run from the vicinity of Bryson City to the Fontana Dam.

By the COURT:

Q. Would that connect with the Park Department main highway?

A. It would be no part of the park-to-park, the Blue Ridge Parkway. It would simply be an internal development, Great Smoky Mountain National Park. Their plan of development contemplated more or less of a circular drive around the whole park, you see, and this would be a segment in that general boundary. The Governor and Council of State indicated their willingness to do the matter, and then I prepared a bill for the legislature which the Representative and Senator, Mr. Whitaker was in the Senate and Mr. Edwards in the House, they sponsored that bill and it was passed by the legislature of 1943, authorizing the Governor and Council of State to contribute $100,000 toward the purchase of this land, on condition that it was to be made a part of the Great Smoky——

Q. Purchase of the land, or to go to Swain County?

A. Purchase of the land. We were very careful, for other reasons, that the state did not participate in the matter of the highway bonded indebtedness of the county, because we thought that would open up other difficulties [tr. 147–149].

* * * * *

By Mr. FITTS:

Q. If the proposal had been made by TVA to the State
80 Highway Commission that this matter should be settled not by reconstructing State Highway 288 and not by extinguishing private ownership in the area previously served by that road, but by obtaining releases from all of the individual landowners, releasing TVA and the State of North Carolina and Swain County from any liability for the destruction of access and from any obligation in the future to build any substitute access, would you in your capacity as advisor to the Commission have recommended that such a proposal be accepted? [tr. 151.]

* * * * *

A. It is my opinion that I certainly wouldn't, I know I would not have recommended to the Commission any settlement of this matter other than one of the two propositions, either that the road be rebuilt or that all private ownership be extinguished. Now the two reasons——

Mr. EDWARDS. I thought Your Honor held he couldn't give his opinion.

Mr. FITTS. Why, he held he could.

Mr. EDWARDS. All right.

A. There are two reasons why the extinguishment of private ownership would have to be complete to meet the situation, in my opinion. One is that as long as there was any private ownership, that there would be certain need, even though the individual owner might not insist on them, but there would be certain public needs of access to all of the domain of the state for the various functions of government, and after all, highways, while they do serve individual properties, in my opinion they are pri-
81 marily for the sovereign for the means of communication, in order that the——

By the COURT:

Q. What are you going to do with this 1800 acres, Mr. Ross, that they've got exempted over there in this area?

A. That is exempted for mining purposes, as I understand it, only, was the way the contract specifies.

Q. All right.

A. And then the second, so that all obligations of the State Highway Department would be eliminated only when all of the private ownership was extinguished. Then in the second place, we were very much interested in having the development of the Smoky Mountain Park extended according to its original design, and we realized, the Highway Commission discussed this frequently, that with the building of the Fontana Dam, on account of the spectacular development there, that it would become the object of tourist interest and that some arrangement was going to have to be made for the accommodation of the traffic going into this development, and if we could shift that responsibility to the Federal Government through the Park Service, that we'd be relieving the state of a big future obligation there and that we would also be providing the facilities for the development of the Smoky Mountain Park according to its plan and design.

The COURT. I think it's a fine plan, everything you did, and I thoroughly approve of it.

82 The WITNESS. And our dealings with the Park Service led us to believe that they would not accept and include in the park land unless it was completely covered by the area. Now they agreed, in the conferences with the TVA, this mining proposition was agreed to by the park officials before this contract was entered into.

Mr. EDWARDS. I object to what somebody else entered into.

Mr. FITTS. The contract shows it anyhow.

The COURT. It was entered into.

The WITNESS. And the contract resulted then and was signed by TVA, as introduced here, by the Highway Commission, by Swain County, by the Council of State and by the Park Service through Secretary Ickes.

By Mr. FITTS:

Q. Mr. Ross, do you know——

Mr. EDWARDS. If Your Honor please——

The WITNESS. The money the state paid——

Mr. EDWARDS. Just a minute, Mr. Ross.

The WITNESS. May I just complete what I have done about the contract? The state paid its $100,000 and TVA paid its $400,000 and we felt like we had gone as far as we could in that.

By the COURT:

Q. Paid its $400,000 for what?

A. To Swain County, or paid it over to the state treasurer to be held in trust for the retirement of bonds [tr. 156–159].

83 ON CROSS-EXAMINATION

Q. In other words, the state was willing to donate $100,000 to get out of the idea of maintenance of 288?

A. No; the $100,000 did not come out of the highway fund. It came out of the general fund and was appropriated upon the theory that the state owed an obligation to the Federal Government to complete the boundary of the Smoky Mountain National Park as originally contemplated, and that's set forth in the statute [tr. 168].

PERCY B. FARRABEE, for Petitioner

ON DIRECT EXAMINATION

Q. Do you have any connection with the State Highway Commission of the State of North Carolina?

A. Commissioner.

Q. Did you occupy that position at the time this contract between the TVA and the state and Swain County and the Department of the Interior was negotiated?

A. I did.

Q. Did you have anything to do with the consideration and negotiation of that agreement?

A. Well, we worked on it for about a year and a half.

Q. Can you tell me whether or not the proposition of taking releases from the individual landowners releasing the state and

county and TVA from liability for loss of access was considered by you during those considerations?

* * * * *

84 A. It was suggested as one of the alternatives of the TVA, and I objected to it.

Q. Well, now why did you object? [tr. 175.]

* * * * *

A. I objected on the grounds that under such a settlement the county or the state would get no value for a road that I maintain had some value from the state's standpoint; although it was more or less a local road, it was a state highway and I took the position that it had some value to the state system as a system, and that we would be unwilling to let the TVA go in and extinguish these claims against the road and close it without any compensation to Swain County or the state [tr. 176].

ON CROSS-EXAMINATION

Q. Now the only interest you had as a member of the State Highway Commission in that district was to see that in the closing of Highway 288 or any of the roads, that the individual property owner would have no come-back on the county or the state?

A. Well, that's one; yes.

Q. Well, Mr. Farrabee, that was the main reason, wasn't it?

A. Well, not entirely. The main reason was to effect the best possible settlement looking at the whole picture of it, both statewide and local.

Q. I see. But your obligation was to see that the state was relieved of any responsibility?

A. Yes; that was one of them.

Q. That's all you had anything to do with, wasn't it?

85 A. No, it wasn't. We had other obligations there. There was the county, and there was the value, profitable value of the road from the state standpoint rather than purely local, and——

Q. Well, I see——

A. And there were other factors——

Q. I see. What you wanted to do was to have the TVA pay over all the money that you thought was right to the County of Swain?

A. Well, we wanted to work out the best possible settlement of the problem. One was to make more certain or as certain as possible that there would at some reasonable time be an adequate road from Bryson City to the dam, if that could be worked. Rebuilding the road that was flooded would not, of course, accom-

plish that purpose, because the road to be flooded was not—well, the money we felt had been wasted in building it originally, and we were trying to prevent wasting it again [tr. 178–179].

* * * * *

Q. Just a minute, Mr. Farrabee. Now you went through all the negotiations over there with the TVA and Swain County, knew all about the negotiations?

A. That's right.

Q. Now I believe that Swain County insisted on replacement of 288 by the TVA Authority. That was the Commission's contention, it should be replaced?

A. Well, yes and no.

Q. Well, now what about the "no"?

A. Well, to begin with, we thought we could work out
86 some settlement that we wouldn't have to go—or the TVA wouldn't have to go and what we considered wastefully use a million dollars, but when we finally met one obstacle and another, we finally said: Well, it looks like there's no other way out of it; as much as we regret having to agree to throw away a million dollars, it looks as though it's the only thing to do. So we said go ahead and build the road, and felt relieved, although we knew, or felt, that we were making a mistake. And after we had done that, then the TVA some weeks later called me from Knoxville and said it would be impossible for them to go on and reconstruct 288 on account of the war and the necessary priorities and so forth, that they were unable to obtain them in time to build the road in time to close the dam to flood the present road. So then we had to start all over again and try to work out some other.

Q. The TVA now came to the commissioners of Swain County and said they would not build that road?

A. Could not build it.

Q. Could not build it?

A. That's right.

Q. All right. Now at the time they said that——

By the COURT:

Q. Did they agree to build it if they could get the War Production Board——

A. Well, that was our understanding. We had several meetings and there was just one difficulty and another, and opposition and then approval, and one wanted this and one wanted the other,
87 and after meeting for about a year, Mr. Walker, our Division Engineer, and myself just sort of threw up our hands and said: Well, just go ahead and replace the road, rebuild it, and we are through with it. That's what we did, and they said

all right. Then in two or three or four weeks or a month or something like that, they called me over from Knoxville and asked if we could come over there to the Knoxville office, and we did go over there and they announced to us that that was out, that it was a physical impossibility for them to rebuild the road by the time the water would flood the present 288, on account of priorities from the War Department [sic] and critical materials and labor, and so forth and so on; and then we started on another, and this——

By Mr. JONES:

Q. What two propositions did they make us then, Mr. Farrabee?

A. They made us a proposition then practically the same as what we finally agreed on.

Q. Or that we could enter suit in the name of North Carolina for damages covering up that road?

A. Yes; that's right, that they would go ahead and settle with the property owners and consider the matter closed, and I told them that I wouldn't consider it closed, that I thought that the state had some—there was some value to that road as a state highway other than purely local, and we would sue the TVA for some damage as a result of losing the road, because under such a settlement neither would the county nor the state get anything at all, and it would simply satisfy those that were affected and that would be all.

88 Q. Now when it came to dealing with the individual owners of land in that territory, that is the 44,000 acres, the TVA in all the meetings through its representatives assumed absolute responsibility for acquiring of that property by its own authority, didn't it?

A. That's right.

Q. And Swain County——

The COURT. The contract shows that.

Q. North Carolina had nothing to do with that; any of it. All right.

By the COURT:

Q. They did finally get your road, though, and covered it up, and in spite of that you had to pay them $100,000?

A. Well, Judge, there's a good deal to this thing. In the first place, we couldn't build a road, so then we figured, well, let's try to work this out the best way we can. So we contacted the Park Service. There is an area between the present boundary of the park and the shore line of the proposed lake that was originally intended to be included in the park and be purchased by the state. We considered that a potential liability of the state, that perhaps the Park Service would be used privately and made into nuisance

value, and so forth, and the park would demand of the state that it purchase this 440,000 acres of land—or 44,000 acres of land. So we figured if we could eliminate that possibility that the state would have accomplished something by relieving itself of a potential liability, so we all worked it around, and the best that the TVA could do at that time, it looked, was $200,000. I went
89 to Raleigh with Mr. Walker, and we went to the Governor and got the Governor to agree to put $100,000 up in order to relieve the state of a possible future demand to purchase at a tremendously increased value this 44,000 acres of land.

The COURT. I think your plan was good, and it is going to work out well if you can just get the land that belongs to these fellows here [tr. 180–184].

ON REDIRECT EXAMINATION

Q. One question, Mr. Farmer. In your opinion as a highway engineer, would the reconstruction of that Highway 288 in an equivalent manner to the way it existed, would that have been a wise and economical expenditure of money? [tr. 185.]

* * * * *

A. I did not. I thought it was wasteful originally and it would just be a repetition of the same mistake to spend more money on it. [tr. 186.]

HOWARD K. MENHINICK, for Petitioner

ON DIRECT EXAMINATION

Q. And what is your present position with the TVA?

A. I am Director of the Department of Regional Studies.

Q. Will you describe generally the duties of that position?

A. I am responsible for the direction of the work of that department, which includes assisting urban communities that are physically affected by the dam and reservoir construction
90 program of the Authority to make physical and economic readjustments, and aiding counties in governmental and physical readjustments in order to minimize any local detrimental effects resulting from the activities of the Authority and to enable them to capture all of the possible benefits of the program. Our department is also responsible for encouraging the recreation development of the shore lands of the reservoirs, and fitting these recreation developments into the state's plans for recreation development. We design——

Q. Are you generally familiar with the area of land lying between the northern edge of the Fontana Reservoir and the present southern boundary of the Great Smoky Mountains National Park,

which area extends roughly from the Fontana Dam site on the west to Bryson City on the east?

A. Yes; I am generally familiar with that area. It is a mountainous forested area containing a number of coves and valleys in which there were living at the time of the construction of the Fontana project 216 families. Of these 216 families, 104 owned their property and 112 were tenants. There were in addition about 830 transient families living in shacks and trailers who were participating——

By the COURT:

Q. What kind of families?

A. Transient families, Your Honor, who were participating in the construction of Fontana Dam.

By Mr. FITTS:

Q. Are you familiar with State Highway No. 288?

A. Yes, I am. State Highway 288 is a narrow,
91 winding road with steep grades, sharp curves, hazardous at all times of the year for driving, and particularly dangerous in wet or icy weather. It is listed on most maps as a dry weather road.

Q. Did you have any connection in your official capacity with the consideration of the problem arising out of the flooding of this highway by the Fontana Reservoir?

A. Yes, I did.

Q. What did you do?

A. This particular problem was considered one of the most difficult and complicated readjustments encountered during the construction program of the Tennessee Valley Authority. I was instructed by the General Manager to study this problem in cooperation with the other departments of the Authority and to attempt to devise a satisfactory solution for the problem and to recommend to the General Manager such a solution. These recommendations were presented by me to the General Manager on September 24, 1942, in a memorandum entitled "Fontana Reservoir, Proposed Readjustment of North Carolina Highway 288."

Q. By whom was this highway originally built and how was it financed?

A. Highway 288 was originally built by the Forney Creek Road District. In December '21 that road district issued $400,000 in bonds to finance the construction of this highway. At that time it was contemplated that this $400,000 would be sufficient to build the highway, but it proved insufficient, and two years later $200,000
additional bonds were issued. On May 2, 1938, the highway
92 was taken over by the state, but the outstanding county

road bonds were not taken over. On August 1940, prior to the county refunding program, there were outstanding because of the construction of this highway, $459,000, representing unpaid principal on these bonds and $235,000 of accrued interest, making a total outstanding because of the construction of this highway of $694,000. After the refunding program these bonds became general county obligations.

Q. At the time of the construction of Fontana, the road was state owned, was it?

A. Yes, sir; that's correct.

Q. Now in considering the possible solutions to the problems arising out of the flooding of this highway, did you give consideration to the possible reconstruction or relocation of the road?

A. Yes, we did.

Q. Well, now what conclusions did you reach concerning the desirability of following that alternative?

A. It was our judgment that that alternative was undesirable from the standpoint of the state, the county, the TVA, and the people of the region. The State Highway Engineer and the district representative of the State Highway Commission advised that the state considered it unwise to rebuild that road, that it was not particularly useful as a link in the state highway system and that to rebuild that road would represent a waste of public funds and would involve the state in the continued maintenance of a section of road which had very little value as a state highway.

93 From the standpoint of the county, the rebuilding of this road would give them only a poor road, no better than the present road, and would leave them with this same amount of county indebtedness incurred because of the original construction of the road outstanding. From the standpoint of the TVA, the construction of the road was very disadvantageous because it involved the use of manpower, materials, housing facilities, and equipment which were vitally needed in the construction of Fontana Dam. All of the housing facilities in the region that were available and all of the available manpower had been soaked up in the construction of the dam. If any of these materials or men or housing facilities had to be diverted to the construction of the road, the construction of Fontana Dam, which was a vital war project, would have been slowed down. From the standpoint of the people of the area, it meant that they would be left in there and would not have an opportunity to move out and seek an area of greater economic opportunity.

Q. Well, now in considering this situation, did you give consideration to the possibility of leaving the entire area which was previously served by this road, in private ownership without pro-

viding any substitute means of access, and taking releases from the landowners?

A. We did give consideration to that alternative, but rejected it almost immediately——

Q. With what conclusion——

Mr. Edwards. I object to his conclusions.

Mr. Fitts. He can certainly state.

The Court. Well, let him answer.

94 Q. Well, in your opinion, what were the objections to that method of dealing with the problem?

A. Well, if the problem were handled that way, it would leave the people who were living in that area with access in and out only by water or by mountain trail, and would produce intolerable social and economic problems. It would be impossible to provide adequate schooling for the children of the families, to provide shops and stores, markets for the products, necessary health, police, fire protection. It would have been waseful of public funds——

The Court. I don't think anybody but a moron would have given up his right to use the road, to start with.

A. It would have cost the Authority substantially as much to pay damages for loss of access as it would have to acquire the fee title to the land, and when the time came later for the state or the Federal Government to acquire this land for adding to the National Park, it would mean that funds would have had to be paid twice for the purchase of this land.

Q. Would there have been any way to get the National Park Service to build this improved road if that property were left in private ownership?

Mr. Edwards. Object.

The Court. Answer the question. Objection overruled.

A. Definitely not. The National Park Service has no legal authority to build the parkway except over lands which they own, unless they obtain special Congressional authorization for this purpose. Mr. Newton B. Drury, the Director of the Na-

95 tional Park Service, advised us that the National Park Service would not seek such authorization, nor would it recommend to Congress the appropriation of funds for building such a parkway unless the 44,000 acres of land were acquired and transferred to the National Park Service.

Q. Does this——

Mr. Edwards. Just a minute. I object to this answer, Your Honor, and move that it be stricken out.

The Court. Objection overruled.

Q. Does this area lie within the originally authorized boundaries of the Great Smoky Mountains National Park?

A. It does. The boundaries including this land were authorized by Congress on May 22, 1926, and they are still in effect. The land has always been scheduled for inclusion in the National Park and has not been included to date only because of lack of funds to acquire the land.

Q. Mr. Menhinick, in your official capacity did you make a final report on this subject to the General Manager of the TVA?

A. I did.

Q. Was that report the staff recommendation that was before the Board of Directors at the time it approved this Highway 288 contract and determined to acquire this land?

A. It was [tr. 188–195].

* * * * *

Q. Will you look at this report, Mr. Menhinick, headed "Proposed Agreement, North Carolina State Highway 288, Re-
96 adjustment," and tell me whether or not that is a correct copy of the report you submitted to the General Manager and which was before the Board?

A. It is a correct copy [tr. 196].

ON CROSS-EXAMINATION

Q. Well, Mr. Witness, the road they had down there, 288, wasn't any good at all, was it?

A. It served as local access to the 40,000 acres of land. It's fifty miles by that narrow, winding road from Bryson City to Deals Gap. It's sixty-one miles between Bryson City and Deals Gap south of the river, by way of Highway 19 and 129, but that sixty miles can be driven safely one hour more quickly than the distance can be covered over the hazardous Route 288, so 288 carries practically no through travel between Bryson City and Deals Gap [tr. 197].

* * * * *

By the COURT:

Q. But do you think the parkway would refuse to build a road down there just because some man owned 160 acres and was willing to give them a right of way through it?

A. Yes, sir; I do. I was so advised by the Director of the National Park Service [tr. 207].

* * * * *

Q. I understand this contract says unless the TVA acquires 44,000 acres of land that they won't build this scenic road?

A. The contract states that they will build the scenic road on condition that the TVA acquires the 44,000 acres of land.
97 Q. It wouldn't do to acquire 43,000?

A. No, sir; it would not.

Q. Or 43,999?

A. No, sir. The Park Service objects to having an island of private ownership outstanding in the midst of their National Park.

Q. Don't they run through privately owned land from here to Washington?

A. This particular question was raised at the——

Mr. EDWARDS. Now if Your Honor please——

The COURT. Wait a minute. This is a very interesting witness to me. Let him finish. He is talking to me now.

Q. Go ahead.

A. Your Honor, this question was raised with the Director of the National Park Service when we were asked if we would be willing to leave some of these tracts outstanding, and we asked the National Park Service if they would be agreeable to that, and we were advised that they would not.

Q. I don't understand that, because the road from here to Washington runs through people's private land.

A. Yes, sir. Well, they stated that their experience with the Great Smoky Mountains National Park, where they had permitted some life interests in land, had been very unsatisfactory——

Q. Life interests?

A. Yes. They had trouble with fire control, poaching, and——

Q. Well, they've got——

98 A. And policing, and they didn't want to have any more of it.

Q. Their rights-of-way have got to join some private people's land?

A. Oh, yes; but they don't want these islands of privately owned land in the midst of the National Park. You see this 44,000 acres of land will be included in the park.

Q. That isn't on account of the road, though; that's on account of the park?

A. Yes; it's on account of the park.

Q. It wouldn't affect the building of the road?

A. Except that they are unwilling to go through with the whole arrangement [tr. 208–210].

* * * * *

Q. You've seen these maps?

A. Yes, sir.

Q. I presume you agree with these other gentlemen, Mr. Frierson and the rest of them, that this 160 acres of land known as 1092 is not necessary to the building and maintenance of Fontana Dam. Is that right?

A. No, sir; I do not hold that opinion. The purchase of all of this land is essential to the building of the project, just as much

as any of the land that we will flood, because without it the TVA cannot be relieved of its legal liability because of the flooding of Highway 288 [tr. 212].

* * * * * *

By Mr. JONES:

Q. So far as you say it's necessary, this land, it's not necessary for the Fontana Dam, is it?

A. Yes, sir.

99 Q. Is it necessary in the construction of the dam?

A. Yes, sir; it is. In connection with the building of the dam and the reservoir, we flood portions of State Highway 288 and therefore incur a legal obligation to——

Q. Now you've already got Highway 288, haven't you?

A. Already have it?

Q. Yes, you have.

A. We have it on condition that this agreement is carried out [tr. 213].

S. COLUMBUS WELCH, *for respondents*

ON DIRECT EXAMINATION

By the COURT:

Q. You couldn't haul anything on a rowboat. Wouldn't it make your land almost useless if you were in there with no road?

A. Well, I think sometime there will be a road in there.

Mr. FITTS. Exactly.

Q. Why do you think that, and who will build it?

A. Well, I don't know who will build it.

Q. They are talking about building a scenic road in there. Is that the one you are talking about, the one they are going to build, the park road?

A. Well, I thought somebody might build one through there.

Q. That's a good little "if," you know; it depends on whether Congress authorizes it or not. Your land would be useless until then, wouldn't it?

A. Yes, couldn't farm it much [tr. 225–226].

100

SECTION E

Excerpt from Petitioner's Exhibits Nos. 1 and 2 in the Welch and Burns cases and Exhibits Nos. 1, 2, 2a, and 2b in the Lollis, Bradshaw, Rust, and Hyatt cases

Be it resolved, that the acquisition of the aforesaid interests in the aforesaid tracts of land by the Tennessee Valley Authority is deemed by the Board to be necessary for the carrying out of the

provisions and purposes of the Tennessee Valley Authority Act of 1933.

Petitioner's Exhibit No. 10 in the Welch and Burns cases

To: Gordon R. Clapp, General Manager. 319 NSB.
From: Howard K. Menhinick, Director, Department of Regional Studies. July 9, 1943.

PROPOSED AGREEMENT COVERING NORTH CAROLINA STATE HIGHWAY 288 READJUSTMENT

Attached herewith are four copies of a proposed agreement for the readjustment of North Carolina State Highway 288.

The parties to the contract include (1) the Tennessee Valley Authority, (2) the United States Department of the Interior, (3) the State of North Carolina, represented by the Governor, the Council of State, and the State Highway and Public Works Commission, and (4) Swain County, North Carolina. All parties have accepted the agreement in principle. The Secretary of the Interior has reviewed the present draft of the contract. We are advised that he will sign it after TVA has signed. In our judgment the signatures of the representatives of the State of North Carolina and Swain County will be obtained if the contract has already been signed by the Secretary of the Interior. We are therefore requesting review of the proposed agreement at this time by the TVA Board of Directors and, if acceptable, signature of the agreement on behalf of the Authority.

101

You will recall that North Carolina State Highway 288 extends along the north bank of the Little Tennessee River from Deals Gap to Bryson City. It lies entirely within Swain County. Construction of Fontana Dam will flood many sections of the highway between the Dam and Bryson City. The fundamental basis of the contract, therefore, from the Authority's standpoint, is the settlement of its legal liabilities arising from the flooding of this highway.

Background of the Problem

North Carolina State Highway 288 was built in the early 1920's and financed by road district and county bond issues. In 1940 Swain County assumed the district road bond indebtedness in a general refunding program and now holds approximately $700,000 outstanding bonds resulting from the construction of State Highway 288. Between Fontana Reservoir and the present boundaries of the Great Smoky Mountains National Park to the north extending from the intersection of the

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park boundary with Cheoah Reservoir below Fontana Dam on the west to Lands Creek on the east lie approximately 44,400 acres of forested, mountainous land. This land was included within the original purchase boundaries of the Great Smoky Mountains National Park. The present more limited boundary was established because the National Park Service lacked funds to acquire the property. The National Park Service still has Congressional authority to include this land within the National Park.

The replacement of Highway 288 at its present standards represents the maximum of the Authority's liability with respect to this highway. Highway 288 as now constructed affords only a very low standard of service, however, and you will recall that in its early consideration of the matter the Board came to the conclusion that the reconstruction of the road on an equivalent basis would not constitute a wise expenditure of public funds, and that such reconstruction should therefore not be effected. This same conclusion was reached by WPB which informally advised the Authority that the reconstruction of the highway was not sufficiently important to justify the expenditure of materials and manpower required. The problem accordingly became one of disposing of the liabilities of the Authority with respect to the road without actually rebuilding it and without incurring a greater cost than the estimated expense of the road relocation, all
103 in a manner which would be consistent not only with the best interests of the Federal Government but with those of the State of North Carolina and Swain County as well. I believe the attached contract accomplishes this result.

Provisions of the Contract

In summary, the proposed contract contains the following provisions:

The Tennessee Valley Authority will:

1. Acquire the 44,400 acres of land shown in Exhibit A of the contract. The 1920 acres of North Carolina Exploration Company property lying within this area are not included in the purchase. TVA reserves the right to delay acquisition of the 196 acres owned by the North Carolina Mining Corporation until six months after the cessation of present hostilities. Mineral rights may be left outstanding.

2. Transfer the above lands to the Department of the Interior, for inclusion in the Great Smoky Mountains National Park, protecting the Department against any mineral claims that may be pressed, but reserving to the TVA all rights that may be required in the carrying out of the TVA program.

3. Pay to the State Treasury of North Carolina, Treasurer Ex officio of the North Carolina Local Government Commission, in trust for Swain County, $400,000 to be used in retiring a portion of the principal of the road bonds issued by the County to finance the construction of the present State Highway 288.

The Department of the Interior will:

1. Accept on behalf of the National Park Service the
104 44,400 acres of land shown in Exhibit A of the contract and will include this land within the authorized boundaries of the Great Smoky Mountains National Park.

2. Confirm the fact that its Master Plan for the development of the Park as extended by the addition of these lands includes an "around the park" road of which the park section of a projected road between Deals Gap and Bryson City constitutes an important link. As soon as funds are made available by Congress after the war the Department will construct the park section of the above road as a high-grade parkway, and may bar commercial traffic from this road. On the west it will connect with the west abutment of Fontana Dam and with the TVA access road on the north side of Cheoah Reservoir below Fontana Dam.

The State of North Carolina will:

1. Secure the necessary right of way and construct a high-grade state highway, commencing at an appropriate point on U. S. Highway 19 in Bryson City, North Carolina, and extending to the eastern boundary of the Park where it will connect with the park road to be constructed by the Department of the Interior.

2. Take over and maintain the Fontana access road from its intersection with U. S. Highway 129 near Deals Gap to the east abutment of Fontana Dam.

3. Pay to the Authority $100,000 to aid in the acquisition of the Park land in accordance with the authority granted to the State by Special Act SB 198, enacted by the 1943 session of the North Carolina Legislature.

4. Release the Authority and the United States of
105 America from all obligations in connection with existing North Carolina State Highway 288 and all other roads located on the land shown in Exhibit A.

Swain County, North Carolina, will:

1. Release the Authority and the United States Government from any liability in connection with State Highway 288, or any other roads lying within the lands shown in Exhibit A.

Estimated Cost to the Authority

Colonel Parker, in a memorandum to me dated March 20, 1943, estimates the cost of rebuilding Highway 288 at between $1,000,000

and $1,400,000. He states that in his opinion a settlement which would cost the Authority $1,200,000 would be advantageous to the Authority.

In a memorandum to me of April 22, 1943, Mr. Ned H. Sayford presents estimates of costs of acquiring the land shown in Exhibit A at $645,000 exclusive of mineral rights. Excluding the North Carolina Mining Corporation properties, it is estimated that protection of the Department of the Interior against mineral claims that will be presented will cost the Authority not more than $80,000. The cost of acquiring the North Carolina Mining Corporation properties is estimated at not more than $50,000, making a total of $775,000 for the cost of land acquisition. The $100,000 received from the State of North Carolina will reduce the cost to the Authority of land acquisition to $675,000. Adding to this the $400,000 which the Authority pays to Swain County, brings the cost of the settlement to the Authority to approximately $1,075,000.

106 I believe that you would be interested in having Mr. Fitts explain the present status of the TVA relationships with the North Carolina Exploration Company and the North Carolina Mining Corporation.

The adjustments that will be effected by the proposed contract appear to be advantageous to the Authority, to the State of North Carolina, to Swain County, and to the National Park Service, and in general represent a desirable regional adjustment. I hope therefore that you will wish to recommend to the Board of Directors of the Authority that they approve this proposed agreement.

HKM:RMM.

CC to Wm. C. Fitts, John I. Snyder, E. W. Cowling, C. E. Blee, Frank W. Webster, Paul Ager, W. L. Sturdevant, Ned H. Sayford.

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SECTION F

TENNESSEE VALLEY AUTHORITY ACT

[Public—No. 17—73d Congress, 1st Session]

[H. R. 5081]

May 18, 1933, 48 Stat. 58

[As amended by Public—No. 412—74th Congress, 1st Session]

[H. R. 8632]

August 31, 1935, 49 Stat. 1075

[As amended by Public—No. 224—76th Congress, 1st Session]

[S. 1796]

July 26, 1939, 53 Stat. 1083

[As amended by Public Resolution—No. 88—76th Congress, 3d Session]

[H. J. Res. 544]

June 26, 1940, 54 Stat. 611

[As amended by Public—No. 184—77th Congress, 1st Session]

[H. R. 2097]

July 18, 1941, 55 Stat. 599

[As amended by Public—No. 306—77th Congress, 1st Session]

[H. R. 4961]

November 21, 1941, 55 Stat. 775

An Act to improve the navigability and to provide for the
108 flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This Act may

be cited as the "Tennessee Valley Authority Act of 1933." [48 Stat. 58–59.]*

109 SEC. 2. (a) The board of directors of the Corporation (hereinafter referred to as the "board") shall be composed of three members, to be appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the board, the President shall designate the chairman. All other officials, agents, and employees shall be designated and selected by the board.

(b) The terms of office of the members first taking office after the approval of this Act shall expire as designated by the President at the time of nomination, one at the end of the third year, one at the end of the sixth year, and one at the end of the ninth year, after the date of approval of this Act. A successor to a member of the board shall be appointed in the same manner as the original members and shall have a term of office expiring nine years from the date of the expiration of the term for which his predecessor was appointed.

(c) Any member appointed to fill a vacancy in the board occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(d) Vacancies in the board so long as there shall be two members in office shall not impair the powers of the board to execute the functions of the Corporation, and two of the members in office shall constitute a quorum for the transaction of the business of the board.

(e) Each of the members of the board shall be a citizen
110 of the United States, and shall receive a salary at the rate of $10,000 a year, to be paid by the Corporation as current expenses. Each member of the board, in addition to his salary, shall be permitted to occupy as his residence one of the dwelling houses owned by the Government in the vicinity of Muscle Shoals, Alabama, the same to be designated by the President of the United States. Members of the board shall be reimbursed by the Corporation for actual expenses (including traveling and subsistence expenses) incurred by them in the performance of the duties vested in the board by this Act. No member of said board shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation.

NOTE.—For the purpose of identifying the sections which appeared in the original act of 1933 and those which have been brought into the act by amendment, references have been placed at the end of the sections. For example, the reference at the end of section 1, 48 Stat. 58–59, indicates that this section will be found in volume 48 of the Statutes at Large on pages 58 to 59. All sections will be found in volumes 48, 49, 53, 54, and 55 of the Statutes at Large as indicated.

(f) No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

(g) The board shall direct the exercise of all the powers of the Corporation.

(h) All members of the board shall be persons who profess a belief in the feasibility and wisdom of this Act. [48 Stat. 59.]

SEC. 3. The board shall without regard to the provisions
111 of Civil Service laws applicable to officers and employees of the United States, appoint such managers, assistant managers, officers, employees, attorneys, and agents, as are necessary for the transaction of its business, fix their compensation, define their duties, require bonds of such of them as the board may designate, and provide a system of organization to fix responsibility and promote efficiency. Any appointee of the board may be removed in the discretion of the board. No regular officer or employee of the Corporation shall receive a salary in excess of that received by the members of the board.

All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks, or other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics.

In the event any dispute arises as to what are the prevailing rates of wages, the question shall be referred to the Secretary of Labor for determination, and his decision shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates which have been secured through collective agreement by representatives of employers and employees.

Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract.

112 Insofar as applicable, the benefits of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, as amended, shall extend to persons given employment under the provisions of this Act. [48 Stat. 59–60.]

SEC. 4. Except as otherwise specifically provided in this Act, the Corporation—

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safekeeping of the securities and moneys of the said Corporation as the board may require: Provided, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of
113 America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings [48 Stat. 60–61]: Provided, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code. [49 Stat. 1075].

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct powerhouses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system. [48 Stat. 61, as amended by 49 Stat. 1075].

(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: Provided, that no transfer authorized herein in (b) shall be made without the approval of Congress: And provided further, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: Provided, however, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: And provided further, That no trans-

fer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order
116 to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President. [49 Stat. 1076, as amended by 55 Stat. 599–600.]

(1) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end. [49 Stat. 1080].

SEC. 5. The board is hereby authorized—

(a) To contract with commercial producers for the production of such fertilizers of fertilizer materials as may be needed in the Government's program of development and introduction in excess of that produced by Government plants. Such contracts may provide either for outright purchase of materials by the board or only for the payment of carrying charges on special materials manufactured at the board's request for its program.

(b) To arrange with farmers and farm organizations for
117 large-scale practical use of the new forms of fertilizers under conditions permitting an accurate measure of the economic return they produce. [48 Stat. 61.]

(c) To cooperate with National, State, district, or county experimental stations or demonstration farms, with farmers, landowners, and associations of farmers or landowners, for the use of new forms of fertilizer or fertilizer practices during the initial or experimental period of their introduction, and for promoting the prevention of soil erosion by the use of fertilizers and otherwise. [48 Stat. 61, as amended by 49 Stat. 1076.]

(d) The board in order to improve and cheapen the production of fertilizer is authorized to manufacture and sell fixed nitrogen, fertilizer, and fertilizer ingredients at Muscle Shoals by the em-

ployment of existing facilities, by modernizing existing plants, or by any other process or processes that in its judgment shall appear wise and profitable for the fixation of atmospheric nitrogen or the cheapening of the production of fertilizer.

(e) Under the authority of this Act the board may make donations or sales of the product of the plant or plants operated by it to be fairly and equitably distributed through the agency of county demonstration agents, agricultural colleges, or otherwise as the board may direct, for experimentation, education, and introduction of the use of such products in cooperation with practical farmers so as to obtain information as to the value, effect, and best methods of their use.

118 (f) The board is authorized to make alterations, modifications, or improvements in existing plants and facilities, and to construct new plants.

(g) In the event it is not used for the fixation of nitrogen for agricultural purposes or leased, then the board shall maintain in stand-by condition nitrate plant numbered 2, or its equivalent, for the fixation of atmospheric nitrogen, for the production of explosives in the event of war or a national emergency, until the Congress shall by joint resolution release the board from its obligation, and if any part thereof be used by the board for the manufacture of phosphoric acid or potash, the balance of nitrate plant numbered 2 shall be kept in stand-by condition.

(h) To establish, maintain, and operate laboratories and experimental plants, and to undertake experiments for the purpose of enabling the Corporation to furnish nitrogen products for military purposes, and nitrogen and other fertilizer products for agricultural purposes in the most economical manner and at the highest standard of efficiency.

(i) To request the assistance and advice of any officer, agent, or employee of any executive department or of any independent office of the United States, to enable the Corporation the better to carry out its powers successfully, and as far as practicable shall utilize the services of such officers, agents, and employees, and the President shall, if in his opinion, the public interest, service, or economy so require, direct that such assistance, advice, and service be rendered to the Corporation, and any individual

119 that may be by the President directed to render such assistance, advice, and service shall be thereafter subject to the orders, rules, and regulations of the board: Provided, That any invention or discovery made by virtue of and incidental to such service by an employee of the Government of the United States serving under this section, or by any employee of the Corporation, together with any patents which may be granted thereon, shall be the sole and exclusive property of the Corporation, which is

hereby authorized to grant such licenses thereunder as shall be authorized by the board: Provided further, That the board may pay to such inventor such sum from the income from sale of licenses as it may deem proper.

(j) Upon the requisition of the Secretary of War or the Secretary of the Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content.

(k) Upon the requisition of the Secretary of War the Corporation shall allot and deliver without charge to the War Department so much power as shall be necessary in the judgment of said Department for use in operation of all locks, lifts, or other facilities in aid of navigation.

(l) To produce, distribute, and sell electric power, as herein particularly specified.

(m) No products of the Corporation shall be sold for use outside of the United States, its Territories and possessions, except to the United States Government for the use of its Army and Navy, or to its allies in case of war.

(n) The President is authorized, within twelve months
120 after the passage of this Act, to lease to any responsible farm organization or to any corporation organized by it nitrate plant numbered 2 and Waco Quarry, together with the railroad connecting said quarry with nitrate plant numbered 2, for a term not exceeding fifty years at a rental of not less than $1 per year, but such authority shall be subject to the express condition that the lessee shall use said property during the term of said lease exclusively for the manufacture of fertilizer and fertilizer ingredients to be used only in the manufacture of fertilizer by said lessee and sold for use as fertilizer. The said lessee shall covenant to keep said property in first-class condition, but the lessee shall be authorized to modernize said plant numbered 2 by the installation of such machinery as may be necessary, and is authorized to amortize the cost of said machinery and improvements over the term of said lease or any part thereof. Said lease shall also provide that the board shall sell to the lessee power for the operation of said plant at the same schedule of prices that it charges all other customers for power of the same class and quantity. Said lease shall also provide that, if the said lessee does not desire to buy power of the publicly owned plant, it shall have the right to purchase its power for the operation of said plant of the Alabama Power Company or any other publicly or privately owned corporation engaged in the generation and sale of electric power, and in such case the lease shall provide further that the said lessee shall have a free right of way to build a trans-
mission line over Government property to said plant paying
121 the actual expenses and damages, if any, incurred by the

Corporation on account of such line. Said lease shall also provide that the said lessee shall covenant that during the term of said lease the said lessee shall not enter into any illegal monopoly, combination, or trust with any privately owned corporation engaged in the manufacture, production, and sale of fertilizer with the object or effect of increasing the price of fertilizer to the farmer. [48 Stat. 61–63.]

SEC. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board. [48 Stat. 63.]

SEC. 7. In order to enable the Corporation to exercise the powers and duties vested in it by this Act—

(a) The exclusive use, possession, and control of the United States nitrate plants numbered 1 and 2, including steam plants, located, respectively, at Sheffield, Alabama, and Muscle Shoals, Alabama, together with all real estate and buildings connected therewith, all tools and machinery, equipment, accessories, and materials belonging thereto, and all laboratories and
122 plants used as auxiliaries thereto; the fixed-nitrogen research laboratory, the Waco limestone quarry, in Alabama, and Dam Number 2, located at Muscle Shoals, its powerhouse, and all hydroelectric and operating appurtenances (except the locks), and all machinery, lands, and buildings in connection therewith, and all appurtenances thereof, and all other property to be acquired by the Corporation in its own name or in the name of the United States of America, are hereby intrusted to the Corporation for the purposes of this Act.

(b) The President of the United States is authorized to provide for the transfer to the Corporation of the use, possession, and control of such other real or personal property of the United States as he may from time to time deem necessary and proper for the purposes of the Corporation as herein stated. [48 Stat. 63.]

SEC. 8. (a) The Corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The Corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits.

(b) The Corporation shall at all times maintain complete and accurate books of accounts.

(c) Each member of the board, before entering upon the duties of his office, shall subscribe to an oath (or affirmation) to support the Constitution of the United States and to faithfully and
123 impartially perform the duties imposed upon him by this Act. [48 Stat. 63.]

SEC. 9. (a) The board shall file with the President and with Congress, in December of each year, a financial statement and a complete report as to the business of the Corporation covering the preceding governmental fiscal year. This report shall include an itemized statement of the cost of power at each power station, the total number of employees and the names, salaries, and duties of those receiving compensation at the rate of more than $1,500 a year. [47 Stat. 63.]

(b) All purchases and contracts for supplies or services, except for personal services, made by the Corporation shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: Provided, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $500; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen: Provided further, That in comparing bids and in making awards the Board
124 may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

The Comptroller General of the United States shall audit the transactions of the Corporation at such times as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property, and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transac-

tions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one for public inspection at the principal office of the Corporation, and the other to be retained by him for the uses of the Congress: Provided, That such report shall not be made until the Corporation shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General or the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for
125 each such audit shall be paid from any appropriation or appropriations for the General Accounting Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. The Comptroller General shall make special report to the President of the United States and to the Congress of any transaction or condition found by him to be in conflict with the powers or duties entrusted to the Corporation by law. [48 Stat. 64–64, as amended by 49 Stat. 1080–1081.]

Nothing in this Act shall be construed to relieve the Treasurer or other accountable officers or employees of the Corporation from compliance with the provisions of existing law requiring the rendition of accounts for adjustment and settlement pursuant to section 236, Revised Statutes, as amended by section 305 of the Budget and Accounting Act, 1921 (42 Stat. 24), and accounts for all receipts and disbursements by or for the Corporation shall be rendered accordingly: Provided, That, subject only to the provisions of the Tennessee Valley Authority Act of 1933, as amended, the Corporation is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary, including the final settlement of all claims and litigation by or against the Corporation; and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office, in the settlement of the accounts
126 of the Treasurer or other accountable officer or employee of the Corporation, shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said Act.

The Corporation shall determine its own system of administrative accounts and the forms and contents of its contracts and other business documents except as otherwise provided in the Tennessee Valley Authority Act of 1933, as amended. [55 Stat. 775–776.]

SEC. 9a. The Board is hereby directed in the operation of any

dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority. [49 Stat. 1076.]

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States,
127 counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: Provided, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: Provided further, That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State govern-
128 ments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region [48

Stat. 64]: Provided further, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: Provided further, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages. And provided further, That the terms "States," "counties," and "municipalities" as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction. [49 Stat. 1076.]

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for
129 shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act. [48 Stat. 64–65.]

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board:

Provided, That if any State, county, municipality, or other
130 public or cooperative organization of citizens or farmers,
not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: Provided further, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer
or user by the municipality or other political subdivision
131 or cooperative organization: And provided further, That as
to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: And provided further, That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief. [48 Stat. 65–66.]

SEC. 12a. In order (1) to facilitate the disposition of the surplus power of the Corporation according to the policies set forth

in this Act; (2) to give effect to the priority herein accorded to States, counties, municipalities, and nonprofit organizations in the purchase of such power by enabling them to acquire facilities for the distribution of such power; and (3) at the same time to preserve existing distribution facilities as going concerns and avoid duplication of such facilities, the Board is authorized to advise
132 and cooperate with and assist, by extending credit for a period of not exceeding five years to, States, counties, municipalities and nonprofit organizations situated within transmission distance from any dam where such power is generated by the Corporation in acquiring, improving, and operating (a) existing distribution facilities and incidental works, including generating plants; and (b) interconnecting transmission lines; or in acquiring any interest in such facilities, incidental works, and lines. [49 Stat. 1076–1077.]

SEC. 13. In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds," as used in this section, is defined as the total gross proceeds derived by the Corporation from
133 the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises, and income, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payments shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation dur-

ing the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: Provided, That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property
134 taxes levied against power property purchased and operated by the Corporation in said State and against that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated or said land was privately owned: Provided further, That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than $10,000 in any case: Provided further, That the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which
135 may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county

of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation. [48 Stat. 66, as amended by 54 Stat. 626–627.]

SEC. 14. The board shall make a thorough investigation as to the present value of Dam Numbered 2, and the steam plants
136 at nitrate plant numbered 1, and nitrate plant numbered 2, and as to the cost of Cove Creek Dam, for the purpose of ascertaining how much of the value or the cost of said properties shall be allocated and charged up to (1) flood control, (2) navigation, (3) fertilizer, (4) national defense, and (5) the development of power. The findings thus made by the board, when approved by the President of the United States, shall be final, and such findings shall thereafter be used in all allocation of value for the purpose of keeping the book value of said properties. In like manner, the cost and book value of any dams, steam plants, or other similar improvements hereafter constructed and turned over to said board for the purpose of control and management shall be ascertained and allocated. [48 Stat. 66.]

The Board shall, on or before January 1, 1937, file with Congress a statement of its allocation of the value of all such properties turned over to said Board, and which have been completed prior to the end of the preceding fiscal year, and shall thereafter in its annual report to Congress file a statement of its allocation of the value of such properties as have been completed during the preceding fiscal year.

For the purpose of accumulating data useful to the Congress in the formulation of legislative policy in matters relating to the generation, transmission, and distribution of electric energy and the production of chemicals necessary to national defense and useful in agriculture, and to the Federal Power Commission and other Federal and State agencies, and to the public, the
137 Board shall keep complete accounts of its costs of generation, transmission, and distribution of electric energy and shall keep a complete account of the total cost of generating and

transmission facilities constructed or otherwise acquired by the Corporation, and of producing such chemicals, and a description of the major components of such costs according to such uniform system of accounting for public utilities as the Federal Power Commission has, and if it have none, then it is hereby empowered and directed to prescribe such uniform system of accounting, together with records of such other physical data and operating statistics of the Authority as may be helpful in determining the actual cost and value of services, and the practices, methods, facilities, equipment, appliances, and standards and sizes, types, location, and geographical and economic integration of plants and systems best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy. Such data shall be reported to the Congress by the Board from time to time with appropriate analyses and recommendations, and, so far as practicable, shall be made available to the Federal Power Commission and other Federal and State agencies which may be concerned with the administration of legislation relating to the generation, transmission, or distribution of electric energy and chemicals useful to agriculture. It is hereby declared to be the policy of this Act that, in order, as soon as practicable, to make the power projects self-supporting and self-liquidating, the surplus power shall be sold at rates which, in the opinion of the
138 Board, when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power and in addition to the statement of the cost of power at each power station as required by section 9 (a) of the "Tennessee Valley Act of 1933," the Board shall file with each annual report a statement of the total cost of all power generated by it at all power stations during each year, the average cost of such power per kilowatt hour, the rates at which sold, and to whom sold, and copies of all contracts for the sale of power. [49 Stat. 1077.]

SEC. 15. In the construction of any future dam, steam plant, or other facility, to be used in whole or in part for the generation or transmission of electric power the board is hereby authorized and empowered to issue on the credit of the United States and to sell serial bonds not exceeding $50,000,000 in amount, having a maturity not more than fifty years from the date of issue thereof, and bearing interest not exceeding 3½ per centum per annum. Said bonds shall be issued and sold in amounts and prices approved by the Secretary of the Treasury, but all such bonds as may be so issued and sold shall have equal rank. None of said bonds shall be sold below par, and no fee, commission, or compensation whatever shall be paid to any person, firm, or corpora-

tion for handling, negotiating the sale, or selling the said bonds. All of such bonds so issued and sold shall have all the rights and privileges accorded by law to Panama Canal bonds author-
139 ized by section 8 of the Act of June 28, 1902, chapter 1302, as amended by the Act of December 21, 1905 (ch. 3, sec. 1, 34 Stat. 5) as now compiled in section 743 of title 31 of the United States Code. All funds derived from the sale of such bonds shall be paid over to the Corporation. [48 Stat. 66–67.]

SEC. 15a. With the approval of the Secretary of the Treasury the Corporation is authorized to issue bonds not to exceed in the aggregate $50,000,000 outstanding at any one time, which bonds may be sold by the Corporation to obtain funds to carry out the provisions of section 12a of this Act. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ percentum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury: Provided, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fi-
140 duciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds

of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. No bonds shall be issued hereunder to provide funds
141 or bonds necessary for the performance of any proposed contract negotiated by the Corporation under the authority of section 12a of this Act until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds hereunder shall expire at the end of five years from the date when this section as amended herein becomes law, except that such bonds may be issued at any time after the expiration of said period to provide bonds or funds necessary for the performance of any contract entered into by the Corporation, prior to the expiration of said period, under the authority of section 12a of this Act. [49 Stat. 1078.]

SEC. 15b. No bonds shall be issued by the Corporation after the date of enactment of this section under section 15 or section 15a.

SEC. 15c. With the approval of the Secretary of the Treasury the Corporation is authorized, after the date of enactment of this section, to issue bonds not to exceed in the aggregate $61,500,000. Such bonds may be sold by the Corporation to obtain funds which may be used for the following purposes only:

(1) Not to exceed $46,000,000 may be used for the purchase of electric utility properties of the Tennessee Electric Power Company and Southern Tennessee Power Company, as contemplated in the contract between the Corporation and the
142 Commonwealth and Southern Corporation and others, dated as of May 12, 1939.

(2) Not to exceed $6,500,000 may be used for the purchase and rehabilitation of electric utility properties of the Alabama Power Company and Mississippi Power Company in the following named counties in northern Alabama and northern Mississippi: The counties of Jackson, Madison, Limestone, Lauderdale, Colbert, Lawrence, Morgan, Marshall, De Kalb, Cherokee, Cullman, Winston, Franklin, Marion, and Lamar in northern Alabama, and the counties of Calhoun, Chickasaw, Monroe, Clay, Lowndes, Oktibbeha, Choctaw, Webster, Noxubee, Winston, Neshoba and Kemper in northern Mississippi.

(3) Not to exceed $3,500,000 may be used for rebuilding, replacing, and repairing electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section.

(4) Not to exceed $3,500,000 may be used for constructing electric transmission lines, substations, and other electrical facilities necessary to connect the electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section with the electric power system of the Corporation.

(5) Not to exceed $2,000,000 may be used for making loans under section 12a to States, counties, municipalities, and nonprofit organizations to enable them to purchase any electric utility properties referred to in the contract between the Corporation and the Commonwealth and Southern Corporation and others,
143 dated as of May 12, 1939, or any electric utility properties of the Alabama Power Company or Mississippi Power Company in any of the counties in northern Alabama or northern Mississippi named in paragraph (2).

The Corporation shall file with the President and with the Congress in December of each year a financial statement and complete report as to the expenditure of funds derived from the sale of bonds under this section covering the period not covered by any such previous statement or report. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ per centum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation with the approval of the Secretary of the Treasury: Provided, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public
144 funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treas-

ury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. None of the proceeds of the bonds shall be used for the performance of any proposed contract negotiated by the Corporation under the authority of section
145 12a of this Act until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds under this section shall expire January 1, 1941, except that if at the time such authority expires the amount of bonds issued by the Corporation under this section is less than $61,500,000, the Corporation may, subject to the foregoing provisions of this section, issue, after the expiration of such period, bonds in an amount not in excess of the amount by which the bonds so issued prior to the expiration of such period is less than $61,500,000, for refunding purposes, or, subject to the provisions of paragraph (5) of this section (limiting the purposes for which loans under section 12a of funds derived from bond proceeds may be made) to provide funds found necessary in the performance of any contract entered into by the Corporation prior to the expiration of such period, under the authority of section 12a. [53 Stat. 1083–1085.]

SEC. 16. The board, whenever the President deems it advisable, is hereby empowered and directed to complete Dam Numbered 2 at Muscle Shoals, Alabama, and the steam plant at nitrate plant numbered 2, in the vicinity of Muscle Shoals, by installing in Dam Numbered 2 the additional power units according to the plans and specifications of said dam, and the
146 additional power unit in the steam plant at nitrate plant numbered 2. [48 Stat. 67.]

SEC. 17. The Secretary of War, or the Secretary of the Interior, is hereby authorized to construct, either directly or by contract to the lowest responsible bidder, after due advertisement, a dam in and across Clinch River in the State of Tennessee, which has by long custom become known and designated as the Cove Creek Dam, together with a transmission line from Muscle Shoals, according to the latest and most approved designs, including power house and hydroelectric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, so that the maximum amount of primary power may be developed at Dam Numbered 2 and at any and all other dams below the said Cove Creek Dam: Provided, however, That the President is hereby authorized by appropriate order to direct the employment by the Secretary of War, or by the Secretary of the Interior, of such engineer or engineers as he may designate, to perform such duties and obligations as he may deem proper, either in the drawing of plans and specifications for said dam, or to perform any other work in the building or construction of the same. The President may, by such order, place the control of the construction of said dam in the hands of such engineer or engineers taken from private life as he may desire: And pro-
147 vided further, That the President is hereby expressly authorized, without regard to the restriction or limitation of any other statute, to select attorneys and assistants for the purpose of making any investigation he may deem proper to ascertain whether, in the control and management of Dam Numbered 2, or any other dam or property owned by the Government in the Tennessee River Basin, or in the authorization of any improvement therein, there has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights. [48 Stat. 67.]

SEC. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and

conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other
148 person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam, transmission line, and powerhouse shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River. [48 Stat. 67–68.]

SEC. 19. The Corporation, as an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers, shall have access to the Patent Office of the United States for the purpose of studying, ascertaining, and copying all methods, formulae, and scientific information (not including access to pending applications for patents) necessary to enable the Corporation to use and employ the most efficacious and economical process for the production of fixed nitrogen, or any essential ingredient of fertilizer, or any method of improving and cheapening the production of hydro-electric power, and any owner of a patent whose patent rights may have been thus in any way copied, used, infringed, or employed by the exercise of this authority by the Corporation shall have as the exclusive remedy a cause of action against the Corporation to be instituted and prosecuted on the equity side of the appropriate district court of the United States, for the recovery of reasonable compensation
149 for such infringement. The Commissioner of Patents shall furnish to the Corporation, at its request and without payment of fees, copies of documents on file in his office: Provided, That the benefits of this section shall not apply to any art, machine, method of manufacture, or composition of matter, discovered or invented by such employee during the time of his employment or service with the Corporation or with the Government of the United States. [48 Stat. 68.]

SEC. 20. The Government of the United States hereby reserves the right, in case of war or national emergency declared by Congress, to take possession of all or any part of the property described or referred to in this Act for the purpose of manufacturing explosives or for other war purposes; but, if this right is exercised by the Government, it shall pay the reasonable and fair damages that may be suffered by any party whose contract for the purchase of electric power or fixed nitrogen or fertilizer ingredients is hereby violated, after the amount of the damages has been fixed by the

United States Court of Claims in proceedings instituted and conducted for that purpose under rules prescribed by the court. [48 Stat. 68.]

SEC. 21. (a) All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use, or disposal of public moneys or property of the United States, shall apply to the moneys and property of the Corporation and to moneys and properties of the United States intrusted to the Corporation.

150 (b) Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation or any officer or employee of the United States (1) makes any false entry in any book of the Corporation, or (2) makes any false report or statement for the Corporation, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation or wrongfully and unlawfully to defeat its purposes, shall, on conviction thereof, be fined not more than $5,000 or imprisoned not more than five years, or both. [48 Stat. 68–69.]

SEC. 22. To aid further the proper use, conservation, and development of the national resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act, and to provide for the general welfare of the citizens of said areas, the President is hereby authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expendi-

151 ture of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end. [48 Stat. 69.]

SEC. 23. The President shall, from time to time, as the work provided for in the preceding section progresses, recommend to Congress such legislation as he deems proper to carry out the

general purposes stated in said section, and for the especial purpose of bringing about in said Tennessee drainage basin and adjoining territory in conformity with said general purposes (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin. [48 Stat. 69.]

SEC. 24. For the purpose of securing any rights of flowage, or obtaining title to or possession of any property, real or personal, that may be necessary or may become necessary, in the carrying out of any of the provisions of this Act, the President of the United States for a period of three years from
152 the date of the enactment of this Act, is hereby authorized to acquire title in the name of the United States to such rights or such property, and to provide for the payment for same by directing the board to contract to deliver power generated at any of the plants now owned or hereafter owned or constructed by the Government or by said Corporation, such future delivery of power to continue for a period not exceeding thirty years. Likewise, for one year after the enactment of this Act, the President is further authorized to sell or lease any parcel or part of any vacant real estate now owned by the Government in said Tennessee River Basin, to persons, firms, or corporations who shall contract to erect thereon factories or manufacturing establishments, and who shall contract to purchase of said Corporation electric power for the operation of any such factory or manufacturing establishment. No contract shall be made by the President for the sale of any of such real estate as may be necessary for present or future use on the part of the Government for any of the purposes of this Act. Any such contract made by the President of the United States shall be carried out by the Board: Provided, That no such contract shall be made that will in any way abridge or take away the preference right to purchase power given in this Act to States, counties, municipalities, or farm organizations: Provided further, That no lease shall be for a term to exceed fifty years: Provided further, That any sale shall be on condition that said land shall be used for industrial purposes only. [48 Stat. 69–70.]

153 SEC. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court

for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed $15 for their services, together with an additional amount of $5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into
154 the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are authorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass de novo upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the payment of the money awarded or upon the failure of either party to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be entitled to a writ in the same proceeding to dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner, and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property.

In the event of any property owned in whole or in part by minors, or insane persons, or incompetent persons, or estates of deceased persons, then the legal representatives of such minors, insane persons, incompetent persons, or estates shall have power, by and with the consent and approval of the trial judge in whose court said matter is for determination, to consent to or reject the awards of the commissioners herein provided for, and in the event that there be no legal representatives, or that the legal representatives for such minors, insane persons, or incompetent persons shall fail or decline to act, then such trial judge may, upon motion, appoint a guardian ad litem to act for such minors, insane persons, or incompetent persons, and such guardian ad litem shall act to the full extent and to the same purpose and effect as his ward could act, if competent, and such guardian ad litem shall be deemed to have full power and authority to respond, to conduct, or to maintain any proceeding herein provided for affecting his said ward. [48 Stat. 70–71.]

SEC. 26. Commencing July 1, 1936, the proceeds for each fiscal year derived by the Board from the sale of power or any other products manufactured by the Corporation, and from any other activities of the Corporation including the disposition of any real

or personal property, shall be paid into the Treasury of the United States at the end of each calendar year, save and except such part of such proceeds as in the opinion of the Board shall be necessary for the Corporation in the operation of dams and reservoirs, in conducting its business in generating, transmitting, and distributing electric energy and in manufacturing, selling, and distributing fertilizer and fertilizer ingredients. A continuing fund of $1,000,000 is also excepted from the requirements of this section and may be withheld by the Board to defray
157 emergency expenses and to insure continuous operation: Provided, That nothing in this section shall be construed to prevent the use by the Board, after June 30, 1936, of proceeds accruing prior to July 1, 1936, for the payment of obligations lawfully incurred prior to such latter date. [48 Stat. 71, as amended by 49 Stat. 1079.]

SEC. 26a. The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.

In the event the Board shall, within sixty days after their formal submission to the Board, fail to approve any plans or modifications, as the case may be, for construction, operation, or maintenance of any such structures on the Little Tennessee River, the above requirements shall be deemed satisfied, if upon application to the Secretary of War, with due notice to the
158 Corporation, and hearing thereon, such plans or modifications are approved by the said Secretary of War as reasonably adequate and effective for the unified development and regulation of the Tennessee River system.

Such construction, commencement of construction, operation, or maintenance of any structures or parts thereof in violation of the provisions of this section may be prevented, and the removal or discontinuation thereof required by the injunction or order of any district court exercising jurisdiction in any district in which such structures or parts thereof may be situated, and the Corporation is hereby authorized to bring appropriate proceedings to this end.

The requirements of this section shall not be construed to be a substitute for the requirements any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval, license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be constructed, operated, or maintained by the Corporation, shall be required, notwithstanding the provisions of this section. [49 Stat. 1079.]

SEC. 27. All appropriations necessary to carry out the provisions of this Act are hereby authorized. [48 Stat. 71.]

SEC. 28. That all Acts or parts of Acts in conflict herewith are hereby repealed, so far as they affect the operations contemplated by this Act. [48 Stat. 71.]

159 SEC. 29. The right to alter, amend, or repeal this Act is hereby expressly declared and reserved, but no such amendment or repeal shall operate to impair the obligation of any contract made by said Corporation under any power conferred by this Act. [48 Stat. 72.]

SEC. 30. That the sections of this Act are hereby declared to be separable, and in the event of any one or more sections of this Act, or parts thereof, be held to be unconstitutional, such holding shall not affect the validity of other sections or parts of this Act. [48 Stat. 72, as amended by 49 Stat. 1081.]

SEC. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: Provided, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4 (k) of this Act. [49 Stat. 1080.]

163 In the United States Circuit Court of Appeals
for the Fourth Circuit

Nos. 5373–5378

No. 5373

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

S. COLUMBUS WELCH

No. 5374

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

JOHN BURNS, ET AL.

No. 5375

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

FRED LOLLIS, ET AL.

No. 5376

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

ARNOLD E. BRADSHAW, ET AL.

No. 5377

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

PHILIP G. RUST, ET AL.

No. 5378

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

ABRAHAM COLE HYATT, ET AL.

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

APPENDIX TO BRIEF FOR APPELLEES

164 TESTIMONY BEFORE THE DISTRICT COURT

ROBERT E. FRIERSON, for Petitioner

ON CROSS EXAMINATION

Q. Mr. Frierson, I believe you just have a map there before you now that has been offered in evidence and handed up to the Court that shows tract FR-1092?—A. Yes, sir.

Q. You have that map with you do you?—A. Yes, sir.

Q. Now, Mr. Frierson, the impounded waters on the Fontana Dam only cover about a tenth of an acre of that land, a little down at the lower tip, isn't it?—A. About an acre and a half.

Q. You mean you flood an acre and a half?—A. An acre and six-tenths to be exact, the way we figure it.

Q. You measured that?—A. Yes, sir.

Q. And that's the part that the respondent agrees to make a deed to the government for. You understand that, don't you?—A. I understand you to say so, sir. (Tr., 54-55.)

* * * * *

Q. Now they don't intend to keep that land. The T. V. A. doesn't intend to keep that boundary of land or to use that boundary of land in connection with the Fontana Dam, does it?—A. No; they don't intend to keep it.

Q. Now, they are going to let somebody else have it. That's true, isn't it?—A. That's correct. (Tr., 61.)

* * * * *

By the COURT:

Q. Was that the understanding between the T. V. A. and
165 the Park Service, that you should condemn or buy this land and then transfer it to the Park, Mr. Frierson? Was that the understanding?—A. Yes, sir. (Tr., 63.)

FRANK W. WEBSTER, for Petitioner

ON CROSS EXAMINATION

Q. Mr. Webster, you stated that in your experience with the T. V. A. in acquiring lands for roads, that one method they had was taking releases on property. Now you do know that the T. V. A. has accepted releases from landowners about a road or an access road to their property?—A. Yes, sir.

Q. And they consider that good—Now as a matter of fact, it has been introduced, Your Honor, in evidence, this contract—I will ask you, are you acquainted with this contract that you told His Honor about between the Government and the T. V. A. and the Interior Department?—A. Yes.

Q. You have read it?—A. Yes, sir.

Q. Well, now Mr. Webster, you know that in the contract there is excepted a boundary of land of about 1,900 acres within this area that you are talking about, within the 40,000 acres——

The COURT. 44,000 acres.

Within the 44,000 acres, that the T. V. A. is not required to get and turn over to the Park.—A. Yes, sir.

Q. Now, that is the land of the North Carolina Exploration Company?—A. Yes, sir. (Tr., 103–104.)

S. COLUMBUS WELCH, Respondent

ON DIRECT EXAMINATION

Q. Now Mr. Welch, in the pleadings that I have filed for you as your attorney in this Court, which you are acquainted
166 with, it it stated that you will release the state, county and government from any and all damage on account of closing a road or a way to get to your property.—A. That's right.

Q. You are willing to that?—A. Yes, sir.

Q. You will do that. It is further stated in the pleadings that about an acre or a quarter of an acre of Tract 1092 that is flooded by water, that you will make a deed——A. Yes, sir.

Q. To the United States Government, free.—A. Free.

Q. Deed them every bit of it. That in addition, you will execute any kind of a deed or instrument or authorize the Court in a judgment to release and relieve the United States Government, Tennessee Valley Authority, the State of North Carolina and the County of Swain, from any and all damage by reason of flooding a road or your access to this property?—A. Yes, sir.

Q. You further agree, Mr. Welch, by an amendment to your answer that I filed by permisison of Court today, to give and grant to the Department of the Interior, United States Department of the Interior, the United States Government, or the state, a right of way to build a road over this tract of land containing 163 acres?—A. Yes, sir.

Q. You will convey them that, you will agree that it be put in the judgment, you will do it free and without any charge?—A. Yes, sir. (Tr., 184–186.) [1]

[1] "Tr." refers to the paging of the transcript in Volume II of the record.

CROSS EXAMINATION

Q. Mr. Welch, do you understand that if you keep this property and the reservoir comes up, that you will have no way of getting to it or out of it by road at all? Do you understand that?—A. Yes; I understand that there won't be no road through it.

Q. And do you also understand that you have no
167 way of getting a road built to that property in the future?—A. No; I don't know of any.

Q. Well, are you relying upon some assumption that you are going to get a road built to that property if you keep it?—A. Well, I can get into it, I think.

Q. Well, now, just how?—A. Well, I can get into it on the water.

Q. Do you know anything about the drawdown in that lake, that is, the difference in the water level in that lake in different seasons of the year?—A. I don't——

Q. Has anybody explained that to you?—A. Well, it would be lower sometimes than others.

Q. Well, when the lake is way down low, how are you going to get, even by water, back and forth from your property to the lake without going on land that you don't own. (No answer from the witness.)

Q. You'd have to go on government property, wouldn't you?—A. Yeah.

Q. In order to get there even by water, when the lake is down. So I just want to be sure, do you understand that your situation, if you keep that property, is that you have no road there at all and can only get to it by water if you can get permission to go over property that somebody else owns?—A. Yeah; I understand that.

Q. Now what are you going to do with that land if you keep it?—A. Well, I want to keep it.

Q. What are you going to do with it?—A. Well, several things I could do with it. (Tr., 191–192.)

Agreement of July 30, 1943

This Agreement, made and entered into as of the 30th day of July 1943, by and between Tennessee Valley Authority (hereinafter called the "Authority"), a corporation created by an act of Congress known as the Tennessee Valley Authority Act of 1933; the State of North Carolina (hereinafter called the "State"), acting by and through its Governor, its council of State, and its
State Highway and Public Works Commission; Swain
168 County (hereinafter called the "County"), a political sub-

division of the State of North Carolina, acting by and through The Board of Commissioners for the County of Swain; and United States Department of the Interior (hereinafter called the "Department"), acting herein for the use and benefit of the National Park Service of said Department, witnesseth:

Whereas, the Authority, pursuant to the powers vested in it by the Tennessee Valley Authority Act of 1933, is engaged in the construction of a hydroelectric development, known as the Fontana project, consisting of a dam and reservoir on the Little Tennessee River in North Carolina, said dam being located approximately ten (10) miles upstream from the Tennessee-North Carolina State Line; and

Whereas, the Fornery Creek Road District has heretofore issued bonds for and constructed a road or highway extending from Deals Gap on the west to Bryson City on the east, said road following a course north of the Little Tennessee and Tuckasegee Rivers and south of the present southern boundary of the Great Smoky Mountains National Park (hereinafter referred to as the "Park"); and

Whereas, the County has heretofore assumed full liability for all principal of and interest on the bonds issued for the construction of said road as aforesaid, and in 1940 issued its own refunding bonds (and interest funding bonds) in the place of all such bonds then outstanding and unpaid; and

Whereas, the State has heretofore assumed jurisdiction
169 and control of said Deals Gap-Bryson City road, which is now known as North Carolina State Highway No. 288, and of all other public roads connecting therewith; and

Whereas, the reservoir to be constructed and operated by the Authority as a part of said Fontana Project will submerge, flood, or otherwise adversely affect a substantial portion of said Highway 288 east of the site of the Fontana Dam, together with other public roads connecting with said Highway 288; and

Whereas, the War Production Board has indicated that it would not approve or permit the reconstruction or relocation of said Highway 288 so long as the present war emergency and the shortage of labor, materials, and equipment resulting therefrom continue to exist; and

Whereas, said Highway 288 as now constructed does not furnish or afford a high standard of service, and it is recognized by the parties hereto that the reconstruction or relocation of said road on an equivalent basis after the war emergency or at any other future time would not constitute a wise or efficient expenditure of public funds; and

Whereas, there are now held in private ownership certain lands (hereinafter described in section 1 of this agreement) aggregating

approximately forty-four thousand four hundred (44,400) acres in area, located within the limits of the County south of the present southern boundary of the Park and north of Little Tennessee and Tuckasegee Rivers, all of which acreage (along with certain other acreage now in private ownership) was originally proposed for inclusion within the boundaries of the Park; and

170 Whereas, the acquisition of said land described in section 1 hereof by the United States of America and the inclusion thereof within the boundaries of the Park would serve to extend said boundaries substantially as originally contemplated, and would also establish a basis for the construction by the Department of a park standard road over and across said land; and

Whereas, the Department regards a park standard road connection between Deals Gap and Bryson City as an important link in a planned "around the Park" road, has included the same as a part of a Master Plan for the development of the Park (extended as aforesaid), and, subject to inclusion of the aforesaid additional acreage within the Park area, is agreeable to initiating construction of the Park portion of such a road as soon after the present war as funds are made available therefor by Congress; and

Whereas, the parties hereto desire to provide for and agree upon the extension of the Park boundaries as aforesaid, the closing and ultimate replacement of Highway 288, and the immediate and final settlement and disposition of all claims which the State and the County may at any time have against the Authority or the United States of America by reason of the flooding, taking, or closing of said Highway 288 and the other roads hereinafter described or referred to, all in the manner and upon the terms and conditions hereinafter specified, and all to the end and purpose of avoiding unwise and inefficient expenditures of public funds and of capturing certain benefits for the region affected and the public generally;

Now, therefore, in consideration of the premises and of the
171 mutual covenants and promises hereinafter contained, it is hereby mutually agreed by and between the parties hereto as follows:

1. Promptly upon the execution of this agreement, the authority shall, to the extent it has not already done so, in the name of the United States of America, commence and thereafter prosecute in a systematic, orderly, and diligent manner the acquisition by purchase, the exercise of eminent domain, or otherwise, of the land identified on the map attached to and hereby made a part of this agreement as Exhibit A as "Land Proposed for Transfer to U. S. Department of Interior," the land to be so acquired being more particularly described as follows:

All that land, except that part hereinafter excluded, lying in Swain County, North Carolina, on the north side of the Little Tennessee and Tuckasegee Rivers, and south of the Great Smoky Mountains National Park, extending from Twenty Mile Ridge on the west to the divide between Lands Creek and Peachtree Creek on the east, the east boundary of the area being approximately 2 miles west of Bryson City, North Carolina, the said area being bounded as follows:

(1) On the west and north by the present boundary line of the Great Smoky Mountains National Park;

(2) On the east by the divide between Lands Creek and Peachtree Creek (the nearest property line being the true boundary) but including the two tracts along the Tuckasegee River formerly owned by A. E. Lowe and A. L. and W. C. Nichols and acquired by the Authority from Nantahala Power and Light Company under tract designations FR–262 and FR–264;

(3) On the south by proposed Fontana Lake (1710 con-
172 tour) from the east boundary to a point on the edge of the lake approximately 3,600 feet as measured along the shore (1,710 contour) in a northerly direction from the axis of Fontana Dam; thence first with the north boundaries thence the west boundary of two tracts of land acquired by the Authority from Nantahala Power and Light Company and Carolina Aluminum Company, respectively, under tract designations FR–438 and FR–16 to a point 150 feet north of the center line of the principal access road to Fontana Dam and approximately 100 feet west of Lewellyn Branch; thence along a line parallel to and 150 feet north of said center line in a general westerly direction to an intersection with the boundary line of the Great Smoky Mountains National Park on the south and of Twenty Mile Ridge and east of Twenty Mile Creek.

Excepting and excluding from the area above defined (1) all those lands owned by the North Carolina Exploration Company, consisting of some three or four tracts of land situated in the Eagle Creek and Myers Branch watersheds and containing approximately 1,920 acres, more or less, and (2) all land upstream from Fontana Dam having the elevation of its present ground surface below the plane of the 1,710 foot (m. s. l.) contour.

The above described land contains a net total of approximately 44,400 acres, more or less.

Provided, however, that the Authority may at its election postpone the acquisition or the taking of any steps in connection with the acquisition of all or any part of or interest in the following property:

The tract of land owned by the North Carolina Mining Corporation situated on the north side of the Sugar Fork tributary

of Hazel Creek approximately 2 miles north of Proctor and being the tract of land conveyed by Walter S. Adams and wife, Melind, to the North Carolina Mining Corporation by deed dated March 29, 1901, and recorded in the Office of the Register of Deeds
173 of Swain County, North Carolina, in Deed Book 29, Page 238, the said tract containing 196 acres, more or less.

Until a date six months after the cessation of the hostilities in which the United States is now engaged, it being recognized by the parties hereto that the mining of said tract of land and the removal of such minerals as may be contained therein may be of importance to the prosecution of the war.

It is recognized and agreed that any or all of the lands acquired by the Authority under this section may be subject to outstanding rights of way, easements, and/or mineral rights; that any of said lands acquired from the Aluminum Company of America or any of its subsidiaries may be subject to rights of way one hundred fifty (150) feet in width for any transmission line or lines of any of said companies which may be constructed to interconnect any of the plants of said companies with the power system of the Authority, the location of such rights of way to be as agreed upon from time to time by said companies or any of them and the Authority; and that any of said lands acquired from Carolina Aluminum Company may be subject to any or all of the following perpetual rights, easements, and privileges in favor of Carolina Aluminum Company, its successors and assigns, as the owner or owners of the dam site of the Cheoah Development and as appurtenant thereto:

(2) The right of all times without limitation or restriction to flood by the waters of the reservoir impounded by the Cheoah Dam or any other dam erected on or near the site thereof, the said properties to an elevation of 1,276.63 feet above mean sea level and to flood said properties to such additional elevations as may result from wave action, floods, and other high water conditions.

(b) The right in the discretion of Carolina Aluminum
174 Company, its successors or assigns, to remove from the shore of Cheoah Reservoir and the land under said reservoir and to destroy or otherwise dispose of silt, drift, timber, vegetation, and other matter, and to use said shore and land for such purposes and any other purpose reasonably connected with the maintenance and operation of the Cheoah development, together with the right of ingress, egress, and regress for such purposes with tools, vehicles, and equipment across said properties.

It is further understood and agreed that in the purchase or other acquisition of the aforesaid land as herein provided, the Authority shall be privileged to follow and abide by its standard

policies and procedures, as the same may be varied or amended from time to time, pertaining to the acquisition of lands or interests therein. The Authority shall not be responsible and shall incur no liability under this section for any delay or delays in the acquisition of title to any of said land caused by or attributable to title searches or other studies, condemnation proceedings or other litigation, or caused by or attributable to any act or circumstance which is incident to or reasonably related to such acquisition or which is beyond the Authority's control, it being the intention of the parties that the Authority shall incur no liability for any delays in the acquisition of any land under this section resulting from any cause whatsoever other than the willful failure or refusal of the Authority to take any step necessary to effect such acquisition.

2. Immediately following its acquisition in accordance with section 1 hereof of all of the land described in said section, the Authority shall assign and transfer to the Department, for the use and benefit of the National Park Service and for inclusion as a part of the Park, the right of possession and all other right, title, and interest which the Authority may have in and to said land, and shall also grant to the Department, its agents, servants and invitees the right of access to and use of all lands of the United States in the Authority's custody lying upstream from Fontana Dam between the land to be transferred to the Department hereunder and low watermark on Fontana Lake, together with the right of access to and the use of the waters of said lake, for the purpose of constructing and maintaining thereon boating and recreational facilities, piers, docks, and related equipment, and of performing all other acts which may be reasonably necessary to the administration and use, as a part of the Park, of the lands to be transferred to the Department thereunder shall 2; provided, however, that said assignment, transfer, and grant shall be effected by an agreement of transfer between the Authority and the Department substantially in the form attached to and made a part hereof as Exhibit B, and shall be subject to all of the terms, conditions, provisions, exceptions, conclusions, and reservations contained in said Exhibit B, and shall also be subject to all those rights, easements, and interests (whether or not now listed or specified in said Exhibit B) which have been or may be reserved or left outstanding at the time of the Authority's acquisition of the lands described in section 1, as permitted or contemplated by said section 1; provided further that, prior to the execution of said transfer agreement, a metes and bounds description of the lands to be transferred to the Department thereunder shall be incorporated therein in substitution for the description of said

lands now contained in Exhibit B; and provided further that if the Authority shall at any time have acquired all of the land described in section 1, with the exception of all or of any part of or interest in the North Carolina Mining Corporation tract separately described in said section 1, the Authority and the Department shall then enter into an agreement of transfer, as aforesaid, with respect to so much of the land described in section 1 as the Authority shall then have acquired, and in such case said
176 North Carolina Mining Corporation tract, or the part thereof or interest therein not initially transferred by the Authority to the Department, shall be the subject of a separate and subsequent agreement of transfer between the Authority and the Department, such subsequent agreement of transfer to be consistent with the provisions of this agreement and substantially in the form attached hereto as Exhibit B, and to be executed immediately following the Authority's acquisition of the part of or interest in said tract not covered by the initial agreement of transfer.

The parties recognize and agree that, as an incident to the construction, maintenance, and operation of the Fontana project, the Authority will acquire certain lands and rights and interests in land in addition to those specified to be acquired under section 1 hereof and to be transferred under this section 2. The acquisition of such additional lands and rights and interests in land shall not give rise to any obligation on the part of the Authority to transfer the same, or any part thereof or interest therein, to the Department, and the Authority's sole obligation under sections 1 and 2 of this agreement shall be to the effect the acquisition of the lands specified in section 1 and to transfer the possession and control of said lands to the Department along with the additional rights of access and use specified in the preceding paragraph, all as herein specifically provided.

3. The Department agrees to enter into an agreement or agreements of transfer with the Authority as provided by Section 2 hereof, and, pursuant to and subject to the provisions of such agreement or agreements, to accept an assignment and transfer of the lands described in section 1 hereof, together with the additional rights of access and use specified in section 2. The department further agrees that, forthwith upon the execution and delivery of such an agreement of transfer, it will extend the present boundaries of the Park to embrace and include the land transferred hereby.

177 4. The department represents and states that it has evolved a Master Plan for the development, of the Park as extended by the addition of the lands described in section

1 hereof, and that said Master Plan includes an "around the Park" road, of which the Park section of a projected road between Deals Gap and Bryson City constitutes an important link. Subject to the transfer by the Authority to the Department of the land described in section 1 as herein provided, the Department agrees that, as soon as funds are made available for that purpose by Congress after the cessation of the hostilities in which the United States is now engaged, the Department will construct or cause to be constructed the following described sections of road, all of said sections being hereinafter collectively referred to as the "Park Road";

(a) A section or road beginning at a point on the Fontana Dam Access Road near the crossing of Fax Branch, and extending to a point on the western boundary of the land identified on Exhibit A as the property of North Carolina Exploration Company.

(b) A section of road beginning at the eastern boundary of said North Carolina Exploration Company land and extending to the eastern boundary of the Park as extended hereunder.

(c) A section of road across said North Carolina Exploration Company land connecting the ends of the sections of road described in paragraphs (a) and (b) above.

(d) A section of road beginning at a point in the road described in paragraph (a) above, and extending in a generally southerly direction to the west abutment of Fontana Dam.

Provided, however, that in lieu of the sections of road
178 described in paragraphs (a), (b), and (c), above, the Department may at its election construct or cause to be constructed, as a part of the Park Road, a continuous section of road beginning at a point on the Fontana Dam Access Road near the crossing of Fax Branch and extending around the aforesaid property of the North Carolina Exploration Company (through existing Park lands) to the eastern boundary of the Park as extended hereunder. In the event of such election on the part of the Department, the Department shall nevertheless construct or cause to be constructed, as a part of the Park Road, the section of road described in paragraph (d) above, which section shall in such case commence on said alternative section of Park Road at a point west of the lands identified on Exhibit A as the property of North Carolina Exploration Company. Upon commencement of construction of the Park Road, Authority shall transfer and assign to Department its right of possession, and all its other right, title and interest in and to the land required for the right of way of that portion of the road described in paragraph (d) above which lies within the boundaries of

Fontana Dam Reservation. The Department shall secure and provide for itself all such easements and rights of way as may be necessary for the construction and maintenance of any portion of the Park Road which may be located upon or across any of said North Carolina Exploration Company property.

If and when funds are made available by the Congress for said Park Road as aforesaid, the location and type of said road, the method and manner of constructing the same, and all standards and specifications therefor shall be determined by Department in its sole discretion; provided, however, that said Park Road when constructed shall as a minimum standard be finished throughout its length with a dustless surface not less than twenty (20) feet in width; and provided, further, that said Park Road shall connect at the eastern boundary of the Park, as extended hereunder, at a point to be selected by the Department,
179 with the road which is to be constructed by the State in accordance with and subject to the provisions of section 6 hereof.

The obligation of the Department to construct or provide for the construction of a Park Road as defined in this section 4 shall be subject to and contingent in all respects upon the appropriation by Congress of all funds necessary for such construction, and failure on the part of Congress for any reason to make such appropriations shall not constitute a breach or violation of this agreement by the Department or any other party hereto.

5. Following completion of the Park Road to be constructed by the Department subject to the provisions of section 4, the Department may in its discretion bar said road to commercial use, and restrict the same solely to pleasure and tourist traffic.

6. At such time as the Department shall commence the construction of the Park Road pursuant to section 4 hereof, the State shall forthwith proceed to acquire good and sufficient easements and rights of way for, and shall construct, a road commencing at a point on U. S. Highway 19 in Bryson City, North Carolina, and extending to a point on the eastern boundary of the Park (as extended hereunder) to be selected and designated by the Department, the point so designated by the Department to be such as to provide for the connection of the State road provided for in this section with the Park Road described in section 4. The easements and rights of way to be acquired by the State for said Bryson City-Park Boundary Road shall be not less than two hundred (200) feet in width outside the corporate limits of Bryson City. In all other respects, except for the termini thereof as above provided, the location and type of said road, the method and manner of constructing the same, and all standards and speci-

fications therefor shall be determined by the State in its sole discretion. Provided, however, that said road when con-
180 structed by the State shall as a minimum standard be finished throughout its length with a dustless surface not less than twenty (20) feet in width.

7. Following completion of the construction of the Fontana project by the Authority, the Authority, on its own behalf and as agent of the United States of America, shall quit-claim to the State all of the right, title, and interest which it or the United States of America may have in and to the so-called Fontana Access Road heretofore constructed by the Authority from U. S. Highway 129 near Deals Gap to the left (east) abutment of the Fontana Dam, including all bridges, culverts, and other facilities constituting a part of said access road. In connection with and as a part of the transfer of said access road to the State as aforesaid, the Authority shall also:

(a) Transfer and quit-claim or cause to be transferred and quit-claimed to the State all easements and rights of way acquired by the Authority as agent of the United States appurtenant to those portions or sections of said access road which may be located outside the limits of land of the United States in the custody of the Authority, together with such land as the Authority, as agent of the United States, may hold or acquire in fee west of a point on the north right of way line of said access road approximately one hundred (100) feet west of Lewellyn Branch, and between said north right of way line and the Cheoah Reservoir of Carolina Aluminum Company. For the purposes hereof, the north right of way line of said access road west of said point approximately one hundred (100) feet west of Lewellyn Branch shall be deemed to be a line parallel to and one hundred fifty (150) feet north of the center line of said access road.

(b) Grant and quit-claim or cause to be granted and quit-claimed to the State suitable easements and rights of way for the maintenance of all of the portions of said access road which
181 are located on land of the United States, in the custody of the Authority, where such land is not included in the land to be transferred and quit-claimed to the State under paragraph (a) immediately preceding.

(c) Transfer and assign or cause to be transferred and assigned to the State an agreement between the Authority and Carolina Aluminum Company dated May 5, 1943, relating to an easement for the construction and maintenance of the bridge located on said Fontana Access Road across the Little Tennessee River, together with all rights, privileges, and interests of the Authority and the United States in, to, and under said Agreement.

The State agrees that it will, by formal agreement with the Authority and Carolina Aluminum Company, accept an assignment of the aforesaid agreement of May 5, 1943, and assume all of the duties and obligations of the Authority and the United States of America thereunder, so as to effect the substitution of the State for the Authority and the United States of America for all of the purposes of said agreement as contemplated by section 3 thereof. The State further agrees that, forthwith upon the transfer of said access road as aforesaid, it will open and thereafter maintain said access road for public travel, take over at the expense of the State the maintenance, repair, and upkeep thereof, and thereafter forever hold the Authority and the United States of America harmless on account of any loss, damage, or injury sustained by any person or persons using the same; provided, however, that in transferring said access road to the State as aforesaid, the Authority may reserve the right, but shall have no obligation, to maintain, flatten, plant grass or shrubbery upon, or otherwise modify the slopes of cuts and embankments adjacent to any portion or portions of said access road between the south end of the Little Tennessee River Bridge and the left (east) abutment of Fontana Dam.

182 8. Forthwith upon the execution of this agreement, the State, as a means of cooperating with and assisting the Authority in the purchase of the land described in section 1 hereof, and in the settlement of the problems incident or related thereto, shall pay to the Authority the sum of One Hundred Thousand Dollars ($100,000), such payment to be made for the purposes of and pursuant to the authority contained in S. B. 198 enacted at the 1943 Session of the North Carolina Legislature and approved March 5, 1943.

9. Promptly upon the execution of this agreement, the Authority shall pay to the State Treasurer of North Carolina, Treasurer ex officio of the North Carolina Local Government Commission, in trust for the County, the sum of Four Hundred Thousand Dollars ($400,000), said State Treasurer of North Carolina being hereby designated by the County to receive and receipt for said sum on the County's behalf.

Prior to or simultaneously with the payment of said sum to said State Treasurer of North Carolina, the County shall enter into a trust agreement governing the management and disbursement of said trust fund. Said trust agreement shall be subject to the approval of the North Carolina Local Government Commission, and shall provide that said sum shall be applied by the trustee exclusively to the payment of the principal

of road bonds of the County which are now outstanding and unpaid. The County agrees that said trust agreement, once entered into with the approval of the North Carolina Local Government Commission, shall not be amended, revoked, or supplemented except with the written consent and approval of said Local Government Commission.

Delivery to said State Treasurer, as Treasurer ex officio of the North Carolina Local Government Commission, of the Authority's check in the amount of Four Hundred Thousand Dollars ($400,000), payable to his order as trustee for the County, shall
183 operate as a complete fulfillment and discharge of all obligations of the authority under this section 9.

10. The State and the County hereby agree that they will, forthwith upon receipt of a request from the Authority so to do, by instrument or instruments in form suitable for recording, transfer, assign, convey, and quit-claim unto the Authority and the United States of America all right, title, and interest which they and the public may have in and to that portion or section of existing North Carolina State Highway 288 between Fax Branch and Watkins Branch, in and to all other roads or portions or sections of road (irrespective of elevation) located upon or across any of the land described in section 1 hereof and/or any of the land identified on Exhibit A. hereto as the property of North Carolina Exploration Company, and in and to all other roads or portions or sections of road in the County lying north of the Little Tennessee and Tuckasegee Rivers east of Fontana dam below elevations 1,715 (m. s. l.) including all bridges, culverts, and other facilities constituting a part of any of said roads or portions or sections of road, together with all easements and rights of way appurtenant thereto. The State and the County further agree that they will, forthwith upon receipt of a request from the Authority so to do, take or procure the taking of any and all action which may be necessary and appropriate to vacate and abandon all of the roads and portions or sections of road to be conveyed and quit-claimed as provided in this paragraph, and to close the same to the use of the public. Until such time as the Authority shall request the conveyance and the vacation, abandonment, and closing of the roads or portions or sections of road referred to in this paragraph, all such roads or portions or sections of road shall retain their present status and continue to be used and maintained as public roads or highways.

184 In consideration of the premises and of the covenants and promises of the Authority and the Department in and under this agreement, the State and the County, for themselves, their respective successors, representatives, and assigns,

shall and do hereby, jointly and severally, release, acquit, and discharge the Authority, its successors and assigns and its agents and employees, and the United States of America of and from all obligations, liability, claims and demands of every nature, character or description whether now or hereafter existing, arising out of or in any way connected with the inundation, closing, or taking, under or as the result of this agreement or as the result of the construction, maintenance, or operation of Fontana Dam or Fontana Reservoir, of North Carolina State Highway 288, or any portion or section thereof, wheresoever located, or of any other road or roads or section or sections of road (irrespective of elevation) located wholly or partially upon or across any of the land described in section 1 hereof or any of the land identified on Exhibit A. hereto as the property of North Carolina Exploration Company, or of any road or roads or section or sections of road lying north of the Little Tennessee and Tuckasegee Rivers below elevation 1,715 (m. s. l.), together with all obligations, liability, claims, and demands arising out of or in any way connected with any impairment of the efficiency, value, usability, or convenience of any portion (irrespective of elevation or location) of said Highway 288 or of any of said other roads or sections or road, not so inundated, closed or taken; and the State and the County expressly agree that they will not, jointly or severally, maintain or attempt to maintain any suit or cause of action against the Authority, its agents or employees, or the United States of America based upon or arising out of any such inundation, closing, taking, or impairment, it being the intention hereof
185 that the covenants and promises of the Authority and the Department herein contained shall constitute and effect and be accepted as an immediate, complete, and final payment and discharge of all such obligations, liability, claims, and demands; provided, however, that nothing herein contained shall apply to or preclude any action by the State or the County to enforce compliance or to recover damages for non-compliance by the Authority or the Department with their respective covenants and promises herein made.

11. Anything in section 10 to the contrary notwithstanding, the State does not release or waive or agree not to enforce any claim, demand, or "action over" which it may now or hereafter have against the Authority or the United States, and which is based upon an obligation or liability which the State may have or incur to any landowner by reason of his being deprived of access to land owned by him in Swain County, North Carolina, where such obligation or liability on the part of the State arises out of the inundation, flooding, closing, or other impairment.

under or as the result of this agreement or as the result of the construction, maintenance, or operation of Fontana Dam or Fontana Reservoir, of existing North Carolina State Highway 288 between Fax Branch and Watkins Branch; and the Authority hereby expressly agrees to indemnify the State against and save it harmless from any such obligation or liability; provided, however, that whenever such obligation or liability exists or is alleged or claimed to exist on the part of the State in favor of any landowner, the State shall not, except pursuant to a judicial judgment or decree, pay, compromise, settle, or otherwise dispose of such obligation or liability or any claim, demand, suit, or action based thereon without the written consent of the Authority; and provided further that the Authority shall at all times have and exercise full control over the defense,
186 settlement, and disposition of all claims, demands, suits, and actions filed with or against the State in respect of any such obligation or liability, and may compromise, settle, or dispose of the same in any manner or by any method or procedure which it may see fit to adopt in its sole discretion.

Whenever any claim, demand, suit, or action is made or filed with or against the State in respect of an actual or alleged obligation or liability on the part of the State of the kind referred to in the preceding paragraph of this section, the State shall promptly, and in any event within ten (10) days after receipt of formal written notice there by the State or summons issued by any court and served on the State, give the Authority written notice of the making or filing of such claim, demand, action, or suit, so as to permit the Authority to defend, compromise, settle, or otherwise dispose of the same as herein contemplated. In the event of failure by the State to give the Authority written notice of any such claim, demand action or suit as herein provided, or if the State shall, otherwise than pursuant to judicial judgment or decree, pay, compromise, settle, or otherwise dispose of any such claim, demand, action, or suit without the written consent of the Authority, then and in either or any of such events, the Authority shall be relieved and discharged of any obligation to indemnify the State against or save it harmless from any obligation or liability in respect of such claim, demand, suit, action, or any renewal thereof.

12. This agreement may be simultaneously executed and delivered in any number of counterparts, and each such counterpart shall be deemed an original.

In witness whereof, the parties hereto have caused this
187 agreement to be executed by their proper representatives

thereunto duly authorized as of the day and year first above written.

TENNESSEE VALLEY AUTHORITY,
By ARTHUR S. JAUDREY,
Acting General Manager.

Attest:

GLADYS M. BURNHART,
Assistant Secretary.

STATE OF NORTH CAROLINA,
By J. MELVILLE BROUGHTON, *Governor,*
And by COUNCIL OF STATE,
By J. MELVILLE BROUGHTON, *Chairman.*
And by STATE HIGHWAY AND PUBLIC WORKS COMMISSION,
By D. B. MCCARAY *Chairman.*

Attest:

INA L. FERRELL, *Secretary.*

GRANT OF FLOWAGE EASEMENT AND RELEASE FROM DAMAGES

Tract No. FR-442-F

(Documentary Stamps $275.00 attached)

Contract of May 12, 1944

This indenture, made and entered into this 12th day of May 1944, by and between the North Carolina Exploration Company, a Corporation organized and existing under and by virtue of the laws of the State of Delaware (hereinafter called the "Grantor") and the United States of America (hereinafter called the "Grantee"),

Witnesseth: That for and in consideration of the sum of
188 Two Hundred Fifty Thousand Dollars ($250,000), cash in hand paid by the Tennessee Valley Authority, acting as agent for the United States of America, the receipt whereof is hereby acknowledged, the Grantor has this day bargained and sold and does hereby grant, bargain, sell, transfer and convey unto the Grantee and its assigns easement rights in and over the land hereinafter described, for the following uses and purposes:

(1) Over that portion of the following described land which lies below contour elevation 1715.63, Mean Sea level (all elevations referred to herein being based upon Mean Sea Level as established by the Southeastern Supplementary Adjustment of 1936, U. S. C. & G. S.), and containing 389 acres, more or less:

(a) The right to overflow, flood, and cover said hereinafter designated backwater created by the erection and operation of Fontana Dam across the Little Tennessee River.

(b) The right to enter upon said land from time to time and prepare the reservoir area for impoundage of the water and remove therefrom any timber or other natural growth and any obstructions, accumulations, trash, filth or any other thing which would interfere with navigation or flood control.

(c) Excepting use of the property for mining purposes, the right to prevent the draining or dumping into said reservoir of such other refuse, sewerage, or other material not reasonably connected with mining operations which might tend to pollute the same.

(d) The right to enter upon said land and do such drainage and other as in the discretion of the Authority may be necessary to carry out an adequate program of malaria control, including the maintenance of necessary patrols and the application of larvicides.

(e) The right to enter upon said land and do such dredging, excavating, and other channel improvement work as in the discretion of the Authority may be necessary, together with the right to erect and maintain beacons or other signal structures as aids to navigation.

189 (2) Over that portion of the following described land which lies between contour elevation 1,715.63 and elevation 1,722.63 and containing 10 acres, more or less, the right to temporarily overflow the land and store water during flood periods.

The land affected by the easement rights set forth above is located in Forneys Creek Township of Swain County, State of North Carolina, on the right bank of the Little Tennessee River, approximately 1 mile east of the Fontana Dam, and is more particularly described as follows:

Beginning at a 36-inch sycamore tree in the east boundary line herein described, a corner of the lands of the Swain County Board of Education, and the Nantahala Power & Light Company; thence with the Company's line S. 26°00′ W., 210 feet to a point in the Little Tennessee River; thence with river as it meanders downstream approximately 2,210 feet to a point, a corner of the lands of the Nantahala Power & Light Company, and the J. E. Coburn Heirs; thence with the J. E. Coburn Heirs' line N. 16°00′ E., 210 feet to a point on the right bank of the river; thence N. 19°00′ W., 35 feet to a point in the south right of way line of the Carolina-Tennessee Southern Railway, a corner of the lands of the J. E. Coburn Heirs, and the Carolina-Tennessee Southern Railway Company; thence with the Railway Company's line and the right of way line in a southeasterly direction approximately 2,200 feet

to a point, a corner of the lands of the Carolina-Tennessee Southern Railway Company, and the Swain County Board of Education; thence with the Board's line at right angles to the right of way line of the Railroad S. 35°15′ W., 50 feet to a point; thence parallel to the right of way line of the railroad S. 54°45′ E., 100 feet to the point of beginning.

Also, beginning at a point, a corner of the lands of the J. E. Coburn Heirs, and the Nantahala Power & Light Company, and the most southerly point of the parcel herein described; thence with the Company's line N. 55°12′ W., 1,084 feet to a point in the center line of Myers Branch; thence with the center line of the branch as it meanders downstream approximately 160 feet to a point witnessed by a pipe and a 13-inch buckeye tree;
190 thence, leaving the branch, N. 86°46′ W., 244 feet to a point; thence S. 35°15′ W., 70 feet to a point in the northeast right of way line of the Carolina-Tennessee Southern Railway, a corner of the lands of the Nantahala Power & Light Company, and the Carolina-Tennessee Southern Railway Company; thence with the Railway Company's line and the right of way line in a northwesterly direction approximately 2,390 feet, crossing Eagle Creek at approximately 2,100 feet, to a point, a corner of the lands of the Carolina-Tennessee Southern Railway Company, and the J. E. Coburn Heirs; thence with the J. E. Coburn Heirs' line N. 19°00′ W., 215 feet to a point; thence N. 64°00′ W., 90 feet to a point at the top of the ridge and in a line 300 feet from and parallel to the right bank of the Little Tennessee River, a corner of the lands of the J. E. Coburn Heirs, and the J. E. & Bland W. Coburn Heirs, thence with the J. E. & Bland W. Coburn Heirs' line and the top of the ridge as it meanders approximately along the following bearings and distances:

N. 47°00′ W., 670 feet; N. 23°00′ W., 460 feet to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general northerly direction along the west side of Eagle Creek, the said contour line being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 24°00′ E., 210 feet; N. 51°00′ W., 70 feet; N. 14°00′ E., 60 feet; N. 71°00′ E., 100 feet; N. 45°00′ E., 155 feet; N. 41°00′ W., 60 feet; N. 4°00′ E., 140 feet; N. 21°00′ W., 195 feet; N. 3°00′ W., 230 feet; N. 24°00′ W., 110 feet; N. 29°00′ E., 305 feet; N. 38°00′ E., 270 feet; N. 50°00′ E., 190 feet; N. 17°00′ W., 140 feet; 73°00′ E., 140 feet; N. 14°00′ E., 145 reet; N. 57°00′ E., 110 feet; N. 77°00′ E., 255 feet; N. 59°00′ E., 170 feet; S. 52°00′ E., 135 feet; N. 89°00′ E., 155 feet; N. 15°00′ E., 145 feet; N. 41°00′ W., 85 feet; S. 83°00′ W., 80 feet; N. 57°00′ W., 170 feet; S. 51°00′ W., 170 feet; N. 57°00′

W., 270 feet; S. 65°00′ W., 150 feet; N. 56°00′ W., 85 feet; N. 28°00′ W., 150 feet; S. 80°00′ W., 90 feet; N. 35°00′ W., 95 feet; N. 76°00′ W., 110 feet; S. 81°00′ W., 120 feet; S. 45°00′ W., 120 feet; N. 33°30′ W., 410 feet to a point in the Bland W. Coburn Heirs' line, the said point being N. 65°34′ E., approximately 760 feet from the point in State Highway No. 288 and at the
191 top of a ridge which is a common corner of the lands of the North Carolina Exploration Company, the J. E. & Bland W. Coburn Heirs, and the Bland W. Coburn Heirs; thence with the Bland W. Coburn Heirs' line N. 65°34′ E., 2,370 feet, crossing the narrow gauge railroad of North Carolina Exploration Company at approximately 900 feet, to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general southerly direction east of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line. S. 20° W., 210 feet; S. 10°00′ W., 145 feet; S. 38°00′ E., 180 feet; S. 7°00′ W., 155 feet; S. 73°30′ W., 190 feet; S. 62°00′ E., 385 feet; S. 29°00′ E., 220 feet; S. 75°00′ E., 95 feet; N. 58°00′ E., 245 feet; N. 87°30′ E. 390 feet; S. 24°30′ W., 310 feet; S. 23°00′ E. 105 feet; S. 84°00′ W., 155 feet; S. 44°30′ W., 270 feet; S. 2°00′ W. 100 feet; S. 12°00′ E., 150 feet; S. 30°00′ W., 240 feet; S. 83°00′ E., 29 feet; S. 28°00′ E., 110 feet; S. 52°00′ W., 135 feet; S. 32°00′ E., 250 feet; S. 17°00′ W., 440 feet; N. 26°30′ E., 710 feet; N. 67°00′ E., 150 feet; N. 29°00′ E. 200 feet; S. 86°00′ E., 190 feet; S. 25°00′ W., 315 feet; S. 47°01′ E. 190 feet; S. 68°00′ W., 320 feet S. 10°00′ W., 260 feet; S. 26°00′ E., 100 feet; S. 36°30′ W. 870 feet; S. 12°00′ W. 150 feet; S. 70°00′ E., 155 feet; S. 47°00′ E., 100 feet; S. 56°00′ 150 feet; S 30°00′ W., 150 feet; N. 66°00′ E., 220 feet; S. 86°00′ E., 180 feet; S. 39°00′ W., 240 feet; S. 22°00′ E., 205 feet; S. 79°00′ W., 230 feet; S. 5°00′ E., 210 feet; S. 29/00′ E., 150 feet to a point in a line of the land in dispute between the W. L. Myers Heirs and the North Carolina Exploration Company; thence with the line claims by the W. L. Myers as their boundary line S. 70°34″ W., 40 feet to a point, thence S. 24°06′ E., 196 feet to a point in the 1,722.63 foot contour line, thence with the contour line and a severance line as it meanders in a general westerly direction along the south side of a bend in Eagle Creek and subsequently in a general easterly direction along the north side of the Little Tennessee River, the said contour being defined approximately by the following bearings and distances, the contour however, being the true severance line.

N. 74°00′ W., 95 feet; N. 24°00′ W., 190 feet; N. 60°00′
192 W., 400 feet; S. 37°00′ W., 185 feet; N. 50°00′ W., 215 feet; S. 68°00′ W., 170 feet; N. 70°00′ W., 245 feet; S. 2°00′

E., 180 feet; S. 43°00′ E., 110 feet; S. 82°00′ E., 380 feet; S. 9°00′ E., 200 feet; S. 73°00′ E., 440 feet; S. 56°00′ E., 620 feet to a point in Martha J. Myres line; thence with Martha J. Myers line S. 30°51′ W., 425 feet to a point; thence N. 89°51 E., 956 feet to a point; thence N. 52°21′ E., 400 feet to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general southeasterly direction along the north side of the Little Tennessee River, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line;

S. 12°00′ W., 120 feet; S. 72°00′ W., 160 feet; S. 23°00′ W., 350 feet; S. 53°00′ E., 330 feet; N. 65°00′ E., 250 feet; S. 22°00′ E., 390 feet to a point in the J. E. Coburn Heirs line; thence with the J. E. Coburn Heirs line S. 54°19′ W., 360 feet to the point of beginning. Except, ther'from, 4.5 acres, more or less, comprising an island at a water elevation of 1,722.63, the said island being more particularly described as follows: Beginning at a point in the 1,722.63 feet elevation, the said point being N. 47°30′ E., 1,660 feet from the point at the top of a ridge and in a line 300 feet and parallel to the right bank of the Little Tennessee River which is the common corner of the lands of the J. E. Coburn Heirs, the J. E. & Bland W. Coburn Heirs, and the North Carolina Exploration Company; thence with the contour and an severance line as it meanders around the shore of the island, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line.

N. 23°00′ W., 95 feet; N. 23°00′ E., 250 feet; N. 19°00′ W., 360 feet; S. 73°00′ E., 295 feet; N. 80°00′ E., 270 feet; S. 38°00′ W., 505 feet; S. 23°00′ W., 185 feet; S. 67°00′ W., 120 feet to the point of beginning.

Also beginning at a point in the Bland W. Coburn Heirs line and in the 1,722.63 foot contour line, the said point being S. 24°26′ E., approximately 975 feet from the Chestnut stump and iron pin which is a common corner of the lands of the Bland W. Coburn Heirs, R. E. Wood, and the North Carolina Exploration Company; thence with the contour line and a severance line as it
193 meanders in a general northeasterly direction along the west side of Eagle Creek, the said contour being defined approximately by the following bearings and distance the contour, however, being the true severance line.

N. 2°00′ W., 140 feet; N. 27°00′ E., 220 feet; N. 63°30′ E., 275 feet; N. 5°00′ W. 130 feet; S. 79°00′ E., 125 feet; S. 55°00′ E., 240 feet; N. 76°00′ E., 130 feet; S. 75°30′ E., 220 feet; N. 75°00′ E., 220 feet; N. 8°00′ E., 165 feet; N. 87°01′ W., 130 feet; N. 35°00′ W., 190 feet; N. 3°00′ W., 320 feet; N. 21°30′ E., 350

feet to a point in R. E. Wood's line; thence with R. E. Wood's line, N. 76°01′ E., 318 feet to a point in the center line of Eagle Creek near the mouth of Lost Cove Branch; thence with the center line of the creek as it meanders upstream approximately 1,190 feet to a point in the 1,722.63-foot contour line; thence with the contour line and a severance line as it meanders in a general southerly direction along the east side of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however being the true severance line:

S. 54°00′ E., 160 feet; S. 21°00′ W., 135 feet; S. 65°00′ W., 165 feet; N. 68°00′ W., 400 feet; S. 64°00′ W., 160 feet; S. 11°00′ W., 140 feet; S. 36°00′ W., 180 feet; S. 57°00′ W., 130 feet; S. 53°00′ E., 370 feet; S. 8°30′, 230 feet; S. 24°00′ W., 280 feet; S. 53°00′ W., 245 feet; S. 74°00′ W., 480 feet; N. 89°00′ W., 235 feet; S. 54°00′ W., 190 feet; S. 69°00′ E., 250 feet; S. 79°00′ E., 185 feet; S. 64°30′, 420 feet; N. 79°00′ E., 225 feet; S. 81°00′ E., 340 feet; S. 68°00′ W., 410 feet; S. 40°00′ W., 415 feet; S. 21°00′ E., 330 feet; S. 83°00′ E., 290 feet; S. 60°00′ E., 290 feet; N. 25°00′ E. 465 feet; N. 47°00′ 90 feet; S. 13°00′ E., 350 feet; S. 42°00′ W., 145 feet; S. 1°00′ E., 220 feet; S. 50°00′ W., 110 feet; S. 34°00′ E., 140 feet; N. 69°00′ E., 680 feet; S. 66°00′ E., 90 feet; N. 71°00′ E., 170 feet; N. 16°00′ E., 190 feet; N. 26°00′ E., 120 feet; S. 27°00 E., 250 feet; S. 73°00′ E., 125 feet; N. 74°00′ E., 160 feet; N. 53°00′ E., 290 feet; N. 62°00′ E., 330 feet; S. 76°30′ E., 220 feet; S. 58°00′ W., 190 feet; S. 45°00′ W., 305 feet; S. 59°00′ W., 240 feet; S. 42°00′ W., 465 feet; S. 3°00′ E., 245 feet; S. 77°00′ W., 335 feet; N. 74°00′ W., 350 feet; S. 84°00′ W., 280 feet; S. 56°00′ W., 380 feet; S. 30°00′ W., 375 feet; S. 2°00′ W., 155 feet; N. 85°00′ W., 130 feet; S. 12°00′ W., 155 feet; S. 87°30′ W., 295 feet to a point in
194 the Bland W. Coburn Heirs line; thence with the Bland W. Coburn Heirs line N. 24°26′ 690 feet, crossing Eagle Creek at approximately 420 feet, to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general northly direction along the west side of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however being the true severance line:

N. 76°00′ E., 275 feet; N. 12°00′ E., 110 feet; N. 35°00′ W., 195 feet; N. 14°00′ E., 55 feet; N. 59°00′ E., 105 feet; N. 42°00′ W., 325 feet; N. 60°00′ W., 100 feet; S. 71°00′ W., 160 feet; N. 58°00′ W., 220 feet to a point in the Bland W. Coburn Heirs line; thence with the Bland W. Coburn Heirs line N. 24°26′ W., 1,059 feet to a point in the 1,722.63-foot contour line; thence with the contour line and a severance line as it meanders

first in a northeasterly and then in a northwesterly direction along the west side of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 64°00′ E., 260 feet; N. 72°00′ W., 350 feet to a point in the Bland W. Coburn Heirs line; thence with the Bland W. Coburn Heirs line N. 24°26′ W., 515 feet to the point of beginning. Except, therefrom, 0.9 acre, more or less, comprising an island at a water elevation of 1,722.63, the said island being more particularly described as follows: Beginning at a point in the 1,722.63-foot contour line, the said point being S. 35°30′ E., 2,340 feet from the chestnut stump and iron pin which is the common corner of the lands of the Bland W. Coburn Heirs, R. E. Wood, and the North Carolina Exploration Company; thence with the contour and a severance line as it meanders around the shore of the island, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 77°00′ E., 170 feet; S. 14°00′ E., 30 feet; S. 42°00′ W., 190 feet; N. 73°00′ W., 115 feet; N. 35°00′ E., 120 feet to the point of beginning.

All of the above described land contains a total of 399 acres, more or less, of which 389 acres, more or less, lie below elevation 1,715.63.

The easement rights set forth above are to be acquired
195 subject to such rights as may be vested in the country or state to State Highway No. 288 which affects approximately 9.5 acres and to any other rights of way for public roads traversing the described land, and to such rights as may be vested in third parties to railway, telephone, and transmission line rights of way, and the lands affected by the said easement rights are shown on Tennessee Valley Authority Land Maps. 19MS 421 K. 504-2 and 19MS 421 K. 504-3, Fontana Reservoir, a copy of each of which will be filed in the Register of Deeds Office of Swain County, N. C.

It is understood and agreed that the bearings given in the above description are based on the North Carolina State Coordinate System, Lambert Projection, as established by the U. S. Coast and Geodetic Survey. The central meridian for this coordinate system is located at Longitude 79°00′ W. The elevation given therein refer to Mean Sea Level Datum and are based on the U. S. Coast and Geodetic Survey's Southeastern Supplementary Adjustment of 1936.

To have and to hold the aforedescribed easement rights unto the Grantee and unto its assigns forever.

The Grantor, for itself, its successors and assigns, does hereby covenant to and with the Grantee that it is lawfully seized and possessed of the above described tract of land, that it has a good and lawful right to sell and convey the above described easement rights therein, that said land is free and clear of all encumbrances, and that it will forever warrant and defend the title thereto against the lawful claims of all persons whosoever. There is excepted the mineral interest heretofore severed from the fee within the bounds of State Grant No. 1360, as shown in a deed from C. E. Johnston et al., to J. E. Coburn, recorded in Book 20, page 305, public records of Swain County, North Carolina, and now claimed by M. S. Stein and the successors of Joseph P. Sadler deceased, which mineral interest is in land more particularly described hereinafter.

Beginning at a point of intersection of the northwest boundary of Martha J. Myers' land and the southwest boundary line of Grant No. 1360, the said point being N. 30°51' E., 24 feet from the most westerly corner of Martha J. Myers' land; thence with the southwest boundary line of Grant No. 1360, N. 53°12' W., 2,352 feet to a point (Coordinates: N. 654,049; E. 574,636);
196 thence with the west boundary line of Grant No. 1360, N. 25°31' E., 3,940 feet to a point in the 1,722.63 foot contour on the east side of Eagle Creek; thence with a severance line and the contour line as it meanders in a general southerly direction along the east side of the creek, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 87°30' E., 340 feet; S. 24°30' W., 310 feet; S. 23° E., 105 feet; S. 84° W., 155 feet; S. 44°30' W., 270 feet; S. 2° W., 100 feet; S. 12° E., 150 feet; S. 30° W., 240 feet; S. 83° E., 290 feet; S. 28° E., 110 feet; S. 52° W., 135 feet; S. 32° E., 250 feet; S. 17° W., 440 feet; N. 26°30' E., 710 feet; N. 67°E., 150 feet; N. 29°E., 200 feet; S. 86° E., 190 feet; S. 25° W., 315 feet; S. 47° E., 190 feet; S. 68° W., 320 feet; S. 10° W., 260 feet; S. 26° E., 100 feet; S. 36°30' W., 870 feet; S. 12° W., 150 feet; S. 70° E., 155 feet; S. 47° E., 100 feet; S. 56° W., 150 feet; S. 30° W., 150 feet; N. 66° E., 220 feet; S. 86° E., 180 feet; S. 39° W., 240 feet; S. 22° E., 205 feet; S. 79° W., 230 feet; S. 5° E., 210 feet; S. 29° E., 150 feet to a point in a boundary line of the land in dispute between the W. L. Myers Heirs and the North Carolina Exploration Company; thence with the line claimed by the W. L. Myers Heirs as their boundary line S. 70°34' W., 40 feet to a point; thence S. 24°06' E., 196 feet to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general westerly direction along the south side of a bend in Eagle Creek and subse-

quently in a general easterly direction along the north side of the Little Tennessee River, the said contour being defined approximately by the following bearings and distances, the contour being the true severance line:

N. 74° W., 95 feet; N. 24° W., 190 feet; N. 60° W., 400 feet; S. 37° W., 185 feet; N. 50° W., 215 feet; S. 68° W., 170 feet; N. 70° W., 245 feet; S. 2° E., 180 feet; S. 43° E., 110 feet; S. 82° E., 380 feet; S. 9° E., 200 feet; S. 73° E., 440 feet; S. 56° E., 620 feet to a point in Martha J. Myers' line; thence with Martha J. Myers' line S. 30°51′ W., 401 feet, to the point of beginning.

Also, beginning at a point of intersection of the southwest boundary line of Grant No. 1360 and the south boundary line of Martha J. Myers' land (Coordinates: 652,620; E. 576,547) the said
197 point being N. 89°51′ E., 40 feet from the most westerly corner of Martha J. Myers' land; thence with Martha J. Myers' line N. 89°51′ E., 403 feet to a point in the east boundary line of Grant No. 1360; thence with the east boundary line of Grant No. 1360; S. 3°43′ W., 289 feet, passing a pine stump at approximately 50 feet, to a point in the northeast boundary line of the Nantahala Power & Light Company's land and at the most southerly corner of Grant No. 1360; thence with the Nantahala Power & Light Company's line and the southwest boundary line of Grant No. 1360, N. 53°12′ W., 479 feet, leaving the Nantahala Power & Light Company's line and crossing Myers Branch at 21 feet, to the point of beginning.

All of the above described land contains a total of 107.7 acres, more or less, of which 4.5 acres, more or less, lie above elevation 1,772.63, leaving a net total of 103.2 acres, more or less, lying below elevation 1,722.63.

It is understood and agreed that the coordinates and bearings given in the above description are for the North Carolina State Coordinate System, Lambert Projection, as established by the U. S. Coast and Geodetic Survey. The origin for this coordinate system is at Latitude 33°45′ N., and Longitude 79°00′ W., and has been assigned a value of x=2,000,000 feet and y=0 feet.

In further consideration of the purchase price of $250,000, the Company, for itself, its successors and assigns forever, hereby releases, acquits and discharges the Authority, its successors and assigns and its agents and employees, and the United States of America, of and from all obligations, liability, claims and demands of every nature, character, and description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience, or injury resulting to the above described property, to any other property owned by the Company

in the Fontana Reservoir area and any mining operations now or which may hereafter be conducted thereon, where such loss, damage, interference, impairment or injury is or may be alleged or claimed to have resulted from or to be in any way connected with the construction of Fontana Dam or the creation or operation of Fontana Reservoir, including but not limited to: (a) the loss, destruction and impairment of all means of access and access facilities of every description, which shall
198 extend to, include and relieve from any responsibility in connection therewith, the State of North Carolina and Swain County, North Carolina, an (b) the loss, damage, impairment, interference or injury to the said property or to any and all mining operations which may now or hereafter be conducted thereon, resulting from flooding, seeping, or percolating waters. The Company expressly agrees, for itself, its successors and assigns, not to maintain or attempt to maintain any action or cause of action against the Authority, its agents or employees, or the United States of America, based upon or arising out of any such loss, damage, interference, impairment of injury, it being the intention hereof that the payment made by the Authority hereunder constitutes and effects, and is hereby accepted as, an immediate, complete and final payment and discharge and just compensation of all obligations, liability, claims and demands whatsoever, arising out of the construction of Fontana Dam and the creation and operation of Fontana Reservoir on the Little Tennessee River in North Carolina.

The Grantor understands and hereby agrees that all buildings and fences located on that portion of the above described land lying below the 1,715.63 contour level constitute potential hazards to navigation and must be removed. This conveyance is made, however, upon the condition that the Grantor may salvage said buildings provided they are removed from the land prior to a date which will be determined by the Tennessee Valley Authority and said Authority shall give notice to the Grantor, orally or by letter, at least 30 days in advance of said date.

In witness whereof, the North Carolina Exploration Company, the Grantor herein, has caused this instrument to be executed by its duly authorized officers on this the day and year first above written.

NORTH CAROLINA EXPLORATION COMPANY,
By M. A. CAINE, *President.*

Attest:

[SEAL AFFIXED] HENRY KAUFMAN, *Secretary.*

199 STATE OF NEW YORK,
County of New York.

This is to certify that on the 12th day of May 1944, before me personally came M. A. Caine, with whom I am personally acquainted, who, being by me duly sworn, says that he is the president, and that Henry Kaufman is the secretary of the North Carolina Exploration company, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president and secretary subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation.

Witness my hand and official seal, this the 12th day of May 1944.
My commission expires March 30, 1946.—

[SEAL AFFIXED] FELIX A. WAGNER,
Notary Public.

Felix A. Wagner, Notary Public.
King's Co. Clk's No. 78, Reg No. 94–w–6.
Certificate filed in N. Y. Co.
N. Y. Co. Clk's No. 96, Reg. No. 66–W–6.

STATE OF NORTH CAROLINA,
Swain County.

The foregoing certificate of Felix A. Wagner, a Notary Public of Kings County, New York, New York, attested by his official seal, is adjudged to be correct. Let the instrument, and the certificate be registered.

Witness my hand this 20th day of May A. D. 1944.

H. J. TRUETT,
Clerk of Superior Court.

200 Filed for registration at 4:55 o'clock P. M., May 20, 1944, and registered in the office of the Register of Deeds for Swain County, North Carolina, in Book 67, Page 391, 20 May 1944.

[SEAL] D. R. WELCH,
Deputy Register of Deeds,
Swain County, North Carolina.

This the 15th day of Nov. 1944. This is a true and a correct copy of the Records of this office of the Register of Deeds for Swain County, North Carolina, in Deed Book 67, Page 391.

[SEAL] D. R. WELCH,
Deputy Register of Deeds, Swain County, North Carolina.

201 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5373

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

S. COLUMBUS WELCH, APPELLEE

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

April 18, 1945, the appearance of McKinley Edwards is entered for the appellee.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellee are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5374, 5375, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

202 No. 5373

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

S. COLUMBUS WELCH, APPELLEE

No. 5374

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

JOHN BURNS, ET AL., APPELLEES

No. 5375

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

FRED LOLLIS, ET AL., APPELLEES

No. 5376

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ARNOLD E. BRADSHAW, ET AL., APPELLEES

No. 5377

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

PHILIP G. RUST, ET AL., APPELLEES

No. 5378

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

203 Appeals From the District Court of the United States for the Western District of North Carolina, at Asheville

(Argued June 19, 1945—Decided July 21, 1945)

Before PARKER, SOPER, and DOBIE, Circuit Judges

William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority (Thomas J. Griffin, Solicitor, and Charles J. McCarthy, Assistant General Counsel, Tennessee Valley Authority, on brief),

for Appellant, and George H. Ward and McKinley Edwards (G. Lyle Jones on brief) for Appellees.

PARKER, Circuit Judge:

These are appeals from judgments dismissing petitions of the Tennessee Valley Authority for the condemnation of certain tracts of land. The TVA seeks to acquire the lands in order that it may convey them to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, pursuant to a contract by which its liability for flooding a highway of the State of North Carolina is to be thus extinguished. The District Judge, being of opinion that the power of condemnation vested by Congress in the TVA did not authorize condemnation for such purpose, dismissed the proceedings, and the TVA has appealed.

There is no dispute about the facts. The TVA was created by Congress for the purpose of maintaining and operating the Muscle Shoals properties, improving navigation in the Tennessee River and controlling destructive flood waters in the basins of the Tennessee and Mississippi Rivers. 16 USCA 831. Under the powers granted it by the act, it constructed a large dam and reservoir on the Little Tennessee River in Western North Carolina known as the Fontana Dam and Reservoir. The filling of this reservoir flooded throughout most of its length North Carolina State Highway No. 288, which was the only highway serving the land lying between the Little Tennessee River and the Great Smoky Mountains National Park. There were 44,400 acres of this land and 216 families were living on it at the time.

None of the 44,400-acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a contract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway.

204 The contract referred to arose out of the following circumstances: The territory served by Highway No. 288 was rough mountain land, and the construction of another highway in lieu of the one flooded would have been very expensive and priorities necessary to obtain the manpower and materials for its construction would not have been available in wartime. There was evidence that such highway would have cost $1,400,000, which was more than it would have cost to acquire the 44,400 acres and satisfy

the State of North Carolina for closing the road, and probably a great deal more than any damages recoverable for the closing of the old highway. The 44,400 acres were lands that North Carolina had agreed to convey to the Great Smoky Mountains National Park but had not conveyed because funds for the purchase of park lands had been exhausted before these lands could be acquired. Officials of the state felt, however, that some obligation rested on the state with respect to the matter; and they proceeded to avail themselves of this opportunity to discharge the obligation and entered into a contract which would result in the deeding of the lands to the Park. That contract, to which the TVA, the State of North Carolina, Swain County, and the Department of the Interior were parties, set forth its purpose fully in eleven "whereas" clauses, the last of which is as follows:

"Whereas, the parties hereto desire to provide for and agree upon the extension of the Park boundaries as aforesaid, the closing and ultimate replacement of Highway 288, and the immediate and final settlement and disposition of all claims which the State and the County may at any time have against the Authority or the United States of America by reason of the flooding, taking, or closing of said Highway 288 and the other roads hereinafter described or referred to, all in the manner and upon the terms and conditions hereinafter specified, and all to the end and purpose of avoiding unwise and inefficient expenditures of public funds and of capturing certain benefits for the region affected and the public generally."

The contract contained the following provisions: (1) that the TVA would acquire the 44,400 acres and deed it to the Department of the Interior to be included in the park, would save the state and county harmless from any claims for damages for the flooding of the highway, and would pay $400,000 to the State of North Carolina in trust for Swain County to be used in retiring bonds issued to finance the construction of the highway which had been flooded; (2) that the Department of the Interior would accept the 44,400 acres of land, include it within the boundaries of the Great Smoky Mountains National Park, and, after the war,
205 and as soon as Congress should make the funds available, would construct a high-grade parkway from a point near Fontana Dam to a point near Bryson City, N. C.; and (3) that the State of North Carolina would pay $100,000 to the TVA to aid in the purchase of the lands and would build certain roads to connect with the parkway when it should be constructed.

Pursuant to this contract, the TVA proceeded to acquire by purchase more than 38,000 acres of the land—all of the 44,400 acres, except the six tracts involved in these condemnation proceedings

in the Fontana Reservoir area and any mining operations now or which may hereafter be conducted thereon, where such loss, damage, interference, impairment or injury is or may be alleged or claimed to have resulted from or to be in any way connected with the construction of Fontana Dam or the creation or operation of Fontana Reservoir, including but not limited to: (a) the loss, destruction and impairment of all means of access and access facilities of every description, which shall
198 extend to, include and relieve from any responsibility in connection therewith, the State of North Carolina and Swain County, North Carolina, an (b) the loss, damage, impairment, interference or injury to the said property or to any and all mining operations which may now or hereafter be conducted thereon, resulting from flooding, seeping, or percolating waters. The Company expressly agrees, for itself, its successors and assigns, not to maintain or attempt to maintain any action or cause of action against the Authority, its agents or employees, or the United States of America, based upon or arising out of any such loss, damage, interference, impairment of injury, it being the intention hereof that the payment made by the Authority hereunder constitutes and effects, and is hereby accepted as, an immediate, complete and final payment and discharge and just compensation of all obligations, liability, claims and demands whatsoever, arising out of the construction of Fontana Dam and the creation and operation of Fontana Reservoir on the Little Tennessee River in North Carolina.

The Grantor understands and hereby agrees that all buildings and fences located on that portion of the above described land lying below the 1,715.63 contour level constitute potential hazards to navigation and must be removed. This conveyance is made, however, upon the condition that the Grantor may salvage said buildings provided they are removed from the land prior to a date which will be determined by the Tennessee Valley Authority and said Authority shall give notice to the Grantor, orally or by letter, at least 30 days in advance of said date.

In witness whereof, the North Carolina Exploration Company, the Grantor herein, has caused this instrument to be executed by its duly authorized officers on this the day and year first above written.

NORTH CAROLINA EXPLORATION COMPANY.
By M. A. CAINE, *President.*

Attest:

[SEAL AFFIXED] HENRY KAUFMAN, *Secretary.*

199 STATE OF NEW YORK,
County of New York.

This is to certify that on the 12th day of May 1944, before me personally came M. A. Caine, with whom I am personally acquainted, who, being by me duly sworn, says that he is the president, and that Henry Kaufman is the secretary of the North Carolina Exploration Company, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president and secretary subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation.

Witness my hand and official seal, this the 12th day of May 1944.
My commission expires March 30, 1946.—

[SEAL AFFIXED] FELIX A. WAGNER,
Notary Public.

Felix A. Wagner, Notary Public.
King's Co. Clk's No. 78, Reg No. 94–w–6.
Certificate filed in N. Y. Co.
N. Y. Co. Clk's No. 96, Reg. No. 66–W–6.

STATE OF NORTH CAROLINA,
Swain County.

The foregoing certificate of Felix A. Wagner, a Notary Public of Kings County, New York, New York, attested by his official seal, is adjudged to be correct. Let the instrument, and the certificate be registered.

Witness my hand this 20th day of May A. D. 1944.

H. J. TRUETT,
Clerk of Superior Court.

200 Filed for registration at 4:55 o'clock P. M., May 20, 1944, and registered in the office of the Register of Deeds for Swain County, North Carolina, in Book 67, Page 391, 20 May 1944.

[SEAL] D. R. WELCH,
Deputy Register of Deeds,
Swain County, North Carolina.

This the 15th day of Nov. 1944. This is a true and a correct copy of the Records of this office of the Register of Deeds for Swain County, North Carolina, in Deed Book 67, Page 391.

[SEAL] D. R. WELCH.
Deputy Register of Deeds, Swain County, North Carolina.

201 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5373

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v.

S. COLUMBUS WELCH, APPELLEE

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April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

April 18, 1945, the appearance of McKinley Edwards is entered for the appellee.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellee are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5374, 5375, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

202 No. 5373

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UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

203 Appeals From the District Court of the United States for the Western District of North Carolina, at Asheville

(Argued June 19, 1945—Decided July 21, 1945)

Before PARKER, SOPER, and DOBIE, Circuit Judges

William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority (Thomas J. Griffin, Solicitor, and Charles J. McCarthy, Assistant General Counsel, Tennessee Valley Authority, on brief),

679355—46——9

for Appellant, and George H. Ward and McKinley Edwards (G. Lyle Jones on brief) for Appellees.

PARKER, Circuit Judge:

These are appeals from judgments dismissing petitions of the Tennessee Valley Authority for the condemnation of certain tracts of land. The TVA seeks to acquire the lands in order that it may convey them to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, pursuant to a contract by which its liability for flooding a highway of the State of North Carolina is to be thus extinguished. The District Judge, being of opinion that the power of condemnation vested by Congress in the TVA did not authorize condemnation for such purpose, dismissed the proceedings, and the TVA has appealed.

There is no dispute about the facts. The TVA was created by Congress for the purpose of maintaining and operating the Muscle Shoals properties, improving navigation in the Tennessee River and controlling destructive flood waters in the basins of the Tennessee and Mississippi Rivers. 16 USCA 831. Under the powers granted it by the act, it constructed a large dam and reservoir on the Little Tennessee River in Western North Carolina known as the Fontana Dam and Reservoir. The filling of this reservoir flooded throughout most of its length North Carolina State Highway No. 288, which was the only highway serving the land lying between the Little Tennessee River and the Great Smoky Mountains National Park. There were 44,400 acres of this land and 216 families were living on it at the time.

None of the 44,400-acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a contract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway.

204 The contract referred to arose out of the following circumstances: The territory served by Highway No. 288 was rough mountain land, and the construction of another highway in lieu of the one flooded would have been very expensive and priorities necessary to obtain the manpower and materials for its construction would not have been available in wartime. There was evidence that such highway would have cost $1,400,000, which was more than it would have cost to acquire the 44,400 acres and satisfy

the State of North Carolina for closing the road, and probably a great deal more than any damages recoverable for the closing of the old highway. The 44,400 acres were lands that North Carolina had agreed to convey to the Great Smoky Mountains National Park but had not conveyed because funds for the purchase of park lands had been exhausted before these lands could be acquired. Officials of the state felt, however, that some obligation rested on the state with respect to the matter; and they proceeded to avail themselves of this opportunity to discharge the obligation and entered into a contract which would result in the deeding of the lands to the Park. That contract, to which the TVA, the State of North Carolina, Swain County, and the Department of the Interior were parties, set forth its purpose fully in eleven "whereas" clauses, the last of which is as follows:

"Whereas, the parties hereto desire to provide for and agree upon the extension of the Park boundaries as aforesaid, the closing and ultimate replacement of Highway 288, and the immediate and final settlement and disposition of all claims which the State and the County may at any time have against the Authority or the United States of America by reason of the flooding, taking, or closing of said Highway 288 and the other roads hereinafter described or referred to, all in the manner and upon the terms and conditions hereinafter specified, and all to the end and purpose of avoiding unwise and inefficient expenditures of public funds and of capturing certain benefits for the region affected and the public generally."

The contract contained the following provisions: (1) that the TVA would acquire the 44,400 acres and deed it to the Department of the Interior to be included in the park, would save the state and county harmless from any claims for damages for the flooding of the highway, and would pay $400,000 to the State of North Carolina in trust for Swain County to be used in retiring bonds issued to finance the construction of the highway which had been flooded; (2) that the Department of the Interior would accept the 44,400 acres of land, include it within the boundaries of the Great Smoky Mountains National Park, and, after the war,
205 and as soon as Congress should make the funds available, would construct a high-grade parkway from a point near Fontana Dam to a point near Bryson City, N. C.; and (3) that the State of North Carolina would pay $100,000 to the TVA to aid in the purchase of the lands and would build certain roads to connect with the parkway when it should be constructed.

Pursuant to this contract, the TVA proceeded to acquire by purchase more than 38,000 acres of the land—all of the 44,400 acres, except the six tracts involved in these condemnation proceedings

and certain lands, belonging to mining companies, which were excepted from the contract. One of the tracts not acquired but involved in these condemnation proceedings is a fishing and hunting preserve containing 4,500 acres lying at the eastern extremity of the 44,400 acres and adjoining the Great Smoky Mountains National Park. The others, with the exception of the 163-acre tract of the defendant Welch, also lie near the eastern boundary of the 44,400 acres. Welch and one Burns, another of the owners, have renounced all claims on account of the flooding of the road and ask nothing but that they be left alone in the enjoyment of their property.

The Board of Directors of the TVA passed resolutions to the effect that the condemnation of the property involved in these cases is necessary to carry out the purposes of the TVA Act. The position of its counsel in this court is that the courts are bound by the resolutions of the Directors; that the TVA Act imposes upon them the duty of determining what lands are necessary to carry out the provisions of the Act; and that they have determined that the lands here involved are necessary to the completion of the Fontana project "because their removal from private ownership is essential to the settlement of the Authority's legal liability to the State of North Carolina". Defendants, on the other hand, point out that it is conceded that all of the lands in question are far removed from the high-water mark of the reservoir; that no part of the lands and no material located thereon will be used in the construction, operation or maintenance of the Fontana Dam project, and that immediately upon their acquisition the lands are to be conveyed to the Department of the Interior for incorporation in the Great Smoky Mountains National Park. Defendants accordingly argue that the lands are not being acquired for a public use for which the TVA is authorized to condemn private property, but to be used in making settlement of liability for flooding the state highway; that this is not a taking for the statutory project, but a taking in excess of what is needed for that purpose; and that such taking cannot be held a taking for a public use within the authority granted. We think, as did the judge below, that this position is well taken.

206 As pointed out above, the purpose of the creation of the TVA, so far as its relation to the Tennessee River is concerned, was the improvement of navigation and flood control in that river. Any condemnation of lands by it must have relation to this purpose; and we think that the power of condemnation is expressly so limited by the statute. The TVA seeks to spell out an almost unlimited power of condemnation from certain general powers granted it, such as the general power to purchase, lease

and hold such real and personal property as it deems necessary or convenient in the transaction of its business, 16 USCA 831c (f), the general power to institute condemnation proceedings for the acquisition of land, easements and rights of way necessary to carry out the provisions of the Act, 16 USCA 831x, the power to cooperate with federal, state and local agencies in the readjustment of displaced populations, 16 USCA 831c (1), the power to negotiate and conclude contracts for the relocation of properties, enterprises and projects, 16 USCA 831q, and the general provision that the act shall be liberally construed, with provisos that no real estate shall be held except that necessary to carry out projects decided upon and that it shall dispose of other lands which it may acquire, 16 USCA 831dd. The power to acquire real estate for the construction of dams and reservoirs, however, is specifically covered by section 4 (i) of the statute, 16 USCA 831c (i), which is as follows:

"(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation projects, at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the Board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act. * * *."

The lands here in question are certainly not being taken for any of the purposes above enumerated in the statute. Their condemnation can be sustained only if they may be taken by the TVA for use in discharging a liability arising from the taking and flooding of the highway. This, we think, is taking, not for the public use for which the statute gives the right of condemnation, but for a private use, or at most for a public use not authorized by statute, and that the resolution of the Directors as to the necessity of the taking does not affect its character or justify the condemnation.

It is well settled, of course, that, ordinarily, the necessity of a taking for public use is a legislative and not a judicial ques-
207 tion and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts. Rindge Co. v. County of Los Angeles, 262 U. S. 700, 709; Bragg v. Weaver, 251 U. S. 57, 58; Shoemaker v. United States, 147 U. S. 282; 18 Am. Jur. 734, 737. It is equally well settled, however, that "the nature of a use, whether public or private, is ultimately a judicial question." Rindge Co. v. County of Los Angeles, supra, p. 705; City of Cincinnati v. Vester, 271 U. S. 439, 446. Consequently, where property is taken in excess of that required for the authorized public use, the excess to be used for

some other purpose, the courts have power so to declare. Cincinnati v. Vester, 6 Cir. 33 F. 2d 242, 68 A. L. R. 831, and note at 837; affirmed 281 U. S. 439; Warm Springs Irr. Dist. v. Pacific Live Stock Co., 9 Cir. 270 F. 560; Wilton v. St. John's County, 98 Fla. 26, 123 So. 527, 65 A. L. R. 488; Richmond v. Carneal, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341, and note at 1350; Salisbury Land & Imp. Co. v. Com., 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196; Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483. The rule is thus stated in 18 Am. Jur. 736, 737:

"It is a general principle that the legislature cannot authorize the taking of property in excess of that required for the public use, such excess to be sold or devoted to private use. The extent of that power is limited by the necessities of the particular public purpose or use for which the land is sought to be condemned. * * * The mere fact that the land may be resold at a profit whereby the expense of opening a street is reduced does not justify the excess taking. The taking of such excess land is not for a public use. Whether the particular use authorized is public is always a question for the judiciary."

In the case at bar, the only land which it was necessary for the TVA to take for the statutory project was the land covered by its reservoir. In taking this it flooded the highway affording access to the lands in question. This it had the right to do and to condemn the highway and any easements over it appurtenant to the lands to which it afforded access. To condemn the lands themselves, however, was excess condemnation, as they were not needed for any purpose authorized by the statute. Their condemnation cannot be justified as a means of satisfying the liability to the state and county for the flooding of the highway, since this is nothing more than taking private property, not for the statutory public use, but to satisfy an obligation incurred in taking property for such use. If a street railway should damage my property by destroying an easement of light and air, it would hardly be contended that this would give it the right to take the property to escape the payment of damages for the destruction of the easement. Nor would the right be any
208 greater because it desired to transfer the property to another in extinguishment of a claim of damages for property taken from him.

What the TVA is proposing to do here cannot be distinguished in principle from what was condemned by the Supreme Court of Appeals of Virginia in the Carneal case, supra, where Mr. Justice Burks, in a noteworthy opinion, reviews the law and the decisions bearing on the matter. In that case the City of Rich-

mond attempted to take portions of city blocks through which a new boulevard ran, although they were not needed for the boulevard itself. The attempted justification for this excess taking was that, by replatting the lots and readjusting their lines and, presumably, selling them to others, the expense of the improvement could be reduced. In City of Cincinnati v. Vester, supra, the Circuit Court of Appeals of the Sixth Circuit condemned an excess taking for a similar purpose. Certainly the condemnation of land to be used in satisfying the state's claim of damages for the flooding of the road cannot be distinguished in principle from these cases which involved the taking of lands to be used in mitigating damages due to the opening or widening of streets. If the TVA, for the purpose of settling a claim for damages, can take land which it does not need for the public project in which it is engaged, no reason suggests itself why the land could not be taken and sold for the purpose of raising funds to satisfy the claim. The right of private property cannot be flouted in this way. As was well said in the case of Bloodgood v. Mohawk & H. River R. Co., 18 Wend. 9, 31 Am. Dec. 313, 356, quoted in the opinion in the Carneal case:

"When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term 'public improvement,' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us. * * *."

The TVA relies upon Brown v. United States, 263 U. S. 78, in which was upheld the condemnation of land for the relocation of a town flooded by the building of a dam and reservoir. The court pointed out that the circumstances of the case were peculiar and that "a method of compensation by substitution would seem to be the best means of making the parties whole" and that the power of condemnation was necessary to "such substitution." The court relied upon Pitznogle v. Western
209 Maryland R. R. Co., 119 Md. 673, in which it was held that a right of way could be taken by condemnation to substitute for another right of way closed as the result of a taking for public use; but the court was careful to distinguish the case from the Opinion of the Justices, supra, and that class of

cases, holding that property may not be condemned and taken in connection with the opening of a street in order that it may be resold for the benefit of the public. Dohany v. Rogers, 281 U. S. 362, is another case holding that a right of way over other lands may be condemned to be furnished in lieu of a right of way taken. These cases go no further than to hold that the right of eminent domain may be exercised to obtain for another the sort of thing that has been taken from him by the exercise of the power. None of them hold that property of a different sort may be taken from others and given to him in satisfaction of his claim for damages. If the TVA here were attempting to exercise the right of eminent domain to obtain a right of way to build a road to take the place of the road flooded, there would be no question of its right. But when it attempts to condemn lands, not for a substitute roadway, but in order that it may convey them to a public park in order to obtain from the state a release of damages for flooding the road, a very different question is presented. No authority is cited which even remotely sustains such exercise of power, and we know of none.

Another case upon which the TVA relies is Old Dominion Land Company v. United States, 4 Cir. 296 F. 20, affirmed 269 U. S. 55, which is cited as approving a taking to save economic loss to the public. In that case, however, public buildings worth more than a million and a half dollars had been erected on land, worth only a fraction of that amount, which was held by the government under lease that was about to expire. This court held that, under the circumstances, condemnation of the land for the purpose of saving the buildings was for a public use. The Supreme Court, in affirming, based its decision on the ground that the courts must accept the purpose of the acquisition of the property as declared in the Act of Congress under which it was condemned. Nothing said in either opinion sustains what the TVA is attempting here.

We have discussed the case so far as though the carrying out of the contract into which the TVA has entered would result in a saving to the public. As a matter of fact the contract obligates the Department of the Interior to build a highway in the park, when public funds are available, at a cost of several millions of dollars, many times what it would cost to pay the damage resulting from the flooding of the old highway. This may be in the public interest, but it certainly constitutes no saving to the public and involves an expenditure of public funds and a condemnation of property for purposes far remote from those for which the TVA was created. North Carolina, if it sees fit, may condemn lands for the purpose of donation to the park. Yarborough v. North Carolina Park Commission, 196 N. C. 284.

145 S. E. 563, 569. And under the Weeks Law they may be condemned by the United States for park or forestry purposes where funds for their payment have been made available. (Albert Hanson Lumber Co. v. United States, 261 U. S. 581, 587; United States v. Southern Power Co., 4 Cir. 31 F. 2d 852, 856. The TVA, however, has no right to condemn them for such purpose; and for the reasons above stated, we do not think that it may do so merely because by so doing it can settle a liability for flooding a highway.

The judgments appealed from will be affirmed.

Affirmed.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5373

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

S. COLUMBUS WELCH, APPELLEE

Appeal from the District Court of the United States for the Western District of North Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

211 On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5374

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

JOHN BURNS ET AL., APPELLEES

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

May 28, 1945, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts" and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5375, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

212 *Opinion*

Filed July 21, 1945

Note: The opinion appears at page 3a and is, therefore, omitted here.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5374

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

JOHN BURNS ET AL., APPELLEES

Appeal from the District Court of the United States for the Western District of North Carolina

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

213 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5375

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

FRED LOLLIS, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

Note: The opinion appears at page 3a and is, therefore, omitted here.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

214 No. 5375

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

FRED LOLLIS, ET AL., APPELLEES

Appeals From the District Court of the United States for the Western District of North Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5376

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ARNOLD E. BRADSHAW, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts" and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5375, 5377, and 5378, before Parker, Soper, and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

Note: The opinion appears at page 3a and is, therefore, omitted here.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5376

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ARNOLD E. BRADSHAW, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

216 On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5377

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

PHILIP G. RUST, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

217 June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5375, 5376, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

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Judgment

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United States Circuit Court of Appeals, Fourth Circuit

No. 5377

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

PHILIP G. RUST, ET AL., APPELLEES

Appeal from the District Court of the United States for the Western District of North Carolina

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

218 On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5378

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

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May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5375, 5376, and 5377, before Parker, Soper, and Dobie, Circuit Judges, and was argued by counsel and submitted.

219

Opinion

Filed July 21, 1945

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Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5378

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

Appeal from the District Court of the United States For the Western District of North Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

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pealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE.
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

220 *Clerk's certificate*

UNITED STATES OF AMERICA, FOURTH CIRCUIT, *ss*:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief for appellant; appendix to brief for appellees, and the proceedings in the said Circuit Court of Appeals in the therein entitled causes, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in the said causes, made up in accordance with the direction of the Solicitor General of the United States, for use in the Supreme Court of the United States on applications for writs of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 11th day of October A. D. 1945.

[SEAL] CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals,
Fourth Circuit.

220—A Supreme Court of the United States

No. 528—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220—B Supreme Court of the United States

No. 529—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220—C Supreme Court of the United States

No. 530—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220—D Supreme Court of the United States

No. 531—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220-E Supreme Court of the United States

No. 532—October Term, 1945

Order allowing certiorari

Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

220-F Supreme Court of the United States

No. 533—October Term, 1945

Order allowing certiorari

Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

220-G Supreme Court of the United States

October Term, 1945

Nos. 528–533

Stipulation as to record

Filed December 27, 1945

Subject to this Court's approval, it is hereby stipulated and agreed, by and between the attorneys for the respective parties

hereto, that for the purpose of the hearing on Writs of Certiorari, the printed record shall consist of the printed record on Petition for Writs of Certiorari.

220-H It is further stipulated and agreed that either of the parties hereto may refer in their briefs and argument to the original record filed in the Supreme Court of the United States, which has not been printed.

Dated this 17th day of December 1945.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General,
Counsel for Petitioner.

Dated this 20th day of December 1945.

G. L. Jones,
Geo. H. Ward,
G. L. JONES,
GEORGE H. WARD,
Attorneys for Respondents, Fred Lollis, et al., Arnold E. Bradshaw, et al., Philip G. Rust, et al., and Abraham Cole Hyatt, et al., and John Burns, et al.

Dated this 22nd day of December 1945.

McKinley Edwards,
MCKINLEY EDWARDS,
Attorney for Respondents, S. Columbus Welch.

[File endorsement omitted.]

U. S. GOVERNMENT PRINTING OFFICE 1946

Tentative Grade

TENNESSEE
NORTH CAROLINA

GREAT SMOKY MOUNTAINS NATIONAL PARK

FONTANA DAM

FONTANA RESERVOIR
AREA

SHOWING ROAD RELOCATION

FONTANA PROJECT
TENNESSEE VALLEY AUTHORITY

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 528

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH [1]

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, acting upon the relation and for the use of the Tennessee Valley Authority, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fourth Circuit entered in these cases.

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[1] Together with No. 529, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *John Burns, et al.;* No. 530, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Fred Lollis, et al.;* No. 531, United *States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Arnold E. Bradshaw, et al.;* No. 532, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Philip G. Rust, et al.;* and No. 533, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Abraham Cole Hyatt, et al.*

OPINIONS BELOW

The opinions of the district court (R. 12–21) are not reported. The opinion of the circuit court of appeals (R. 201–210) is reported in 150 F. 2d 613.

JURISDICTION

The judgments of the circuit court of appeals were entered on July 21, 1945 (R. 210, 212–214, 215, 216, 219). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when respondents' easements of access have been taken and destroyed by the Tennessee Valley Authority's permanent flooding of the only highway serving their properties, a court can set aside the determination of the Board of Directors of the Tennessee Valley Authority, made in good faith and after a careful evaluation of all available alternatives, that the taking of the fee in respondents' properties is necessary to accomplish an adjustment of the problems resulting from the flooding of the highway.

STATUTE INVOLVED

The provisions of the Tennessee Valley Authority Act of 1933 appear at R. 107–159.

STATEMENT

The United States of America, on behalf of the Tennessee Valley Authority, filed, in the United

States District Court for the Western District of North Carolina, six separate petitions to condemn the lands of the respondents, and, simultaneously therewith, declarations of taking (R. 1–11). Upon stipulation of the parties (R. 41–45), all six cases were consolidated for purposes of the petitioner's appeal (R. 45–46). The facts out of which this litigation arose are as follows:

Under the powers conferred upon it in the Tennessee Valley Authority Act of 1933, as amended (R. 107–159), the Tennessee Valley Authority constructed a dam and reservoir on the Little Tennessee River in western North Carolina, known as the Fontana Dam and Reservoir (R. 23). The filling of this reservoir flooded North Carolina State Highway No. 288 throughout most of its length from the Fontana damsite to Bryson City, N. C. This highway had been the only road providing access to approximately 44,000 acres of land lying on the northern side of the Little Tennessee River between the Fontana damsite and Bryson City, and its flooding left the entire area inaccessible, except to a limited extent by water or by foot trails. (R. 23, 221, 222.) The area, inhabited by about 216 families before the construction of the dam (R. 62), is bounded on the north by the Great Smoky Mountains National Park, and is, in fact, within the

boundaries of that park as originally authorized and defined by Congress (R. 77, 102).[2]

State Highway No. 288 was owned and maintained by North Carolina but had originally been financed by bond issues upon which Swain County, N. C. was obligated (R. 24). It was a narrow, dangerous road, far below modern standards of highway construction (R. 33), following a tortuous course from Deals Gap, N. C. to Bryson City (R. 63). Its flooding created a variety of problems, and the State of North Carolina and Swain County demanded that some action be taken to protect them (R. 24).

The negotiations which ensued (R. 24–25) revolved about two major considerations: (1) the flooding of Highway 288 isolated the area previously served by it and thus effected a taking of the private access rights of the landowners in that area (R. 64, 94), and (2) the flooding of the highway destroyed a link in the North Carolina state highway system and thus effected the taking of an interest vested in the State (R. 84, 101–102). It soon appeared that reconstruction of Highway 288 was not practicable. The War Production Board informally advised the Authority, during the course of the negotiations, that the reconstruction of the high-

[2] The cost of acquisition of the park land was greater than originally contemplated, however, and for this reason this area was not included within the park (R. 77, 102).

way was not sufficiently important to justify the expenditure of materials and manpower required (R. 77, 86, 102, 169).[3] To replace this road with a road of similar quality would have required an expenditure of approximately $1,400,000 (R. 34). The State, the County, and the Authority all recognized that such a replacement would, at any time, have represented an unwise and inefficient expenditure of public funds (R. 85–86, 92, 102, 169). During wartime it would, in addition, have required the diversion of great quantities of supplies and equipment sorely needed in the conduct of the war, and the use of valuable manpower at the height of the worst manpower shortage in the Nation's history (R. 34, 90–93).

Condemnation of the highway was also considered. But in condemnation proceedings, petitioner would presumably have been liable for the reasonable cost of rebuilding the road, a sum in the neighborhood of $1,400,000 (R. 34, 65); and the payment of the judgment in such proceedings, while it would have extinguished petitioner's legal liability to the State, would not have extinguished its liability to the owners of

[3] The district court found (R. 24, 35) that "the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised."

the lands served by the road. The petitioner would have remained liable to such owners for the damage resulting from the destruction of their only means of road access, and the settlement of this liability would have cost substantially the value of the property—about $775,000 (R. 94, 99, 105). The satisfaction of its legal liabilities in this manner would, therefore, have cost the petitioner in excess of $2,000,000, and this expenditure would not have solved the problems created by the construction of the reservoir since the families living in this area would have been left isolated without either roads, schools, or public health or law enforcement facilities (R. 94).

The State insisted that any solution give it absolute assurance that it would be relieved of the necessity of constructing any new facilities to replace Highway No. 288, and also be satisfactory to Swain County, which, while without legal interest in the road, was obligated on an outstanding bond issue. The State refused to accept the plan suggested by some of the landowners that the Authority purchase from all of the individual landowners their rights of access. It insisted that all of the area served by the highway be taken out of private ownership if Highway No. 288 was not to be reconstructed. (R. 69, 79–81.)

The only solution acceptable to the State and the County was the one finally adopted. This solu-

tion is embodied in the settlement contract between the State, the County, the National Park Service, and the Authority (R. 167–187). The essential provision in that agreement is that the Authority must acquire all the land previously served by Highway No. 288, either by voluntary acquisition or condemnation, so as to exonerate the State from any liability to provide access to these properties (R. 170, 171–174).[4] The contract also provides for the transfer of the lands so acquired to the National Park Service for inclusion within the boundaries of the Great Smoky Mountains National Park (R. 103, 174–176), and for the construction by the Park Service of a parkway through the area whenever funds therefor might be made available by Congress (R. 104, 177–179). This parkway is contemplated in the Master Plan evolved by the National Park Service for the development of the Great Smoky Mountains National Park (R. 177). The State agreed to contribute $100,000 to aid in the acquisition of this park land (R. 182, 104), and the Authority agreed to pay Swain County $400,000, to be used in retiring a portion of the road bonds (R. 103, 182).

[4] The contract excepted the lands belonging to the North Carolina Exploration Company (R. 172), and acquisition of the tract owned by the North Carolina Mining Corporation was permitted to be postponed until a date six months after the cessation of hostilities. This was done because the parties recognized that the mining of this tract of land might be of importance to the prosecution of the war. (R. 172–173.)

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When this contract was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendations of its staff which described the situation above outlined and the reasons for the proposed contract (R. 23, 25, 33, 100–106). Upon the basis of such report and recommendation, the Board, on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority. With respect to the fee interest in the lands served by Highway 288 and owned by respondents, the Board passed resolutions stating that (R. 100)

> the acquisition of the aforesaid interests in the aforesaid tracts of land by the Tennessee Valley Authority is deemed by the Board to be necessary for the carrying out of the provisions and purposes of the Tennessee Valley Authority Act of 1933.[4]

These determinations were made in good faith (R. 23, 33).

The Authority purchased all the lands whose acquisition was contemplated by the contract, with

[4] Such a resolution with respect to the lands belonging to John Burns, et al., was passed on June 8, 1944 (R. 22). One respecting the lands of S. Columbus Welch was passed on April 25, 1944 (R. 22–23), and resolutions with respect to the lands of Philip G. Rust, Fred Lollis, Arnold E. Bradshaw, and Abraham Cole Hyatt, were passed on July 26, 1944, October 7, 1944, and December 12, 1944 (R. 32–33).

the exception of the tracts owned by the respondents (R. 34, 205, 221, 222). Apart from about one and one-half acres of land owned by respondent Welch and as to which there is no controversy (R. 26), none of the respondents' lands were flooded by the impounding of the waters of Fontana dam but the rights of access of all were taken by the flooding of Highway 288 (R. 23, 34).

The district court, after announcing opinions in these cases (R. 12–21) and making findings of fact (R. 22–40), entered judgments dismissing the condemnation petitions and striking its former orders placing the Authority in possession of the lands (R. 1–11).[6] The circuit court of appeals affirmed these judgments (R. 210).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the petitioner was without legal power to condemn respondents' lands;

2. In holding that the Tennessee Valley Authority Act does not confer upon petitioner the legal power to acquire respondents' lands;

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[6] As to respondent Welch, the order of taking was modified to authorize continued possession only of the small tract actually flooded (R. 2). The judgments in the cases of respondents Welch and Burns ordered the landowners to release their rights to any recompense for the flooding of the highway and the consequent taking of their rights of access (R. 2–3, 5). This was done on the consent of these respondents (R. 13, 14).

3. In holding, in effect, that the question of the necessity for the taking of lands is a judicial question;

4. In holding that petitioner cannot legally condemn a fee interest in lands when, in the opinion of the court, an easement would be sufficient to meet its requirements;

5. In holding that the court can review a determination made in good faith by the Board of Directors of the Tennessee Valley Authority as to the necessity for the acquisition of an interest in land and substitute its determination for that of the Board of Directors;

6. In holding that the lands were taken by the petitioner for the purpose of transferring them to the National Park Service, Department of the Interior;

7. In holding that the lands were not taken for a public use; and

8. In holding that the Federal Government may not condemn a fee interest in lands even though an authorized taking by the Government has substantially destroyed the value of the lands and the owners are entitled to compensation for that taking.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with that of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Meyer,* 113 F. 2d 387, certiorari denied, 311 U. S. 706. Con-

demnation of a fee simple interest in property for use in connection with a dam on the Mississippi River was there resisted on the grounds that the statutes pursuant to which the petition was filed contemplated the taking of no greater interest than a flowage easement, and that the determination of the Secretary of War that the fee interest was necessary for the accomplishment of the purposes of the project was made in bad faith because the property was to be used for the development of parks and recreational facilities adjacent to the pools created by the dam. The Circuit Court of Appeals for the Seventh Circuit sustained the condemnation petition, holding that the Secretary of War's determination of necessity was not an abuse of discretion, and that the alleged purpose of the taking was not inconsistent with the purpose contemplated by the statutes—betterment of navigation and flood control.

While the *Meyer* case did not arise under the Tennessee Valley Authority Act, the condemnation there sanctioned rested on statutory provisions which, if different at all from those of the Tennessee Valley Authority Act, restricted the eminent domain powers more narrowly. See 113 F. 2d at 392. The Tennessee Valley Authority Act empowers the Authority to condemn "all property that it deems necessary for carrying out the purposes of this Act" (Sec. 4 (i), R. 113), and "any lands, easements, or rights of way which, in the opinion of the Corporation, are nec-

essary to carry out the provisions of this Act" (Sec. 25, R. 153). Other provisions of the Act indicate that this eminent domain power may be used not only with respect to lands which are to be the sites of dams or reservoir, but also with respect to lands found necessary in the settlement of readjustment and relocation problems resulting from the construction of the dam or reservoirs. See, *e. g.*, Sections 4 (k) (*d*), 4 (l), 18, and 31, at R. 115–116, 147–148, and 159.[1]

The legislative history of the Act makes it clear that just such a taking as is here involved was contemplated by Congress. Added by amendments adopted in 1935 (49 Stat. 1080), Section 31 of the Act, as reported by the House Committee on Military Affairs, prohibited the acquisition of any land not "actually necessary to carry out plans and projects actually decided upon requiring the use of such land." H. Rep. No. 1372,

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[1] Nothing in the record supports the suggestion of the court below (R. 203, 210) that the controlling purpose of the Authority in authorizing the takings here involved is to convey them to the Department of Interior for incorporation into the Great Smoky Mountains National Park. The property is sought to be condemned as a necessary means of settling the Authority's liabilities to respondents and the State. That the property will be transferred to the Park Service is one consideration and an incidental result contemplated by the Tennessee Valley Authoity Act (Section 4 (k), R. 114) and as to which respondents have no standing to complain. *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States*, 317 U. S. 698; *United States* v. *Forbes*, 259 Fed. 585, 591–592 (M. D. Ala.), affirmed, 268 Fed. 273 (C. C. A. 5).

74th Cong., 1st sess., p. 22. But in a supplemental report, Representatives Kvale and Maverick pointed out (*id.* at 33) that "In the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line" and further stated that:

> in some sections in the reservoir areas, little peninsulas of land are necessarily isolated. The reservoir waters, will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the lands in peninsulas than to construct new roads along the steep mountain sides. * * *
>
> * * * to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project.

The prohibition contained in Section 31, as reported out by the House Committee, was eliminated in the Section as finally adopted. See H. Rep. No. 1846, 74th Cong., 1st Sess., pp. 6, 9.

2. To avoid a settlement of its legal obligation which would cost more than $2,000,000 and leave 216 families completely isolated, without roads, schools, churches, or any health or community services, the Authority decided against the condemnation of Highway 288 and the purchase of the easements of access appurtenant to the lands formerly served by that highway. Relocation of Highway 288 was also rejected as a means of settlement because reconstruction of this narrow,

dangerous road would have been a patent waste of public funds at any time and was probably impossible in time of war.

Instead, the Authority adopted the only plan acceptable to the State of North Carolina and Swain County.[8] This plan, the final step in which is the condemnation of respondents' lands, made possible the settlement of the petitioner's legal obligations for about $1,075,000; the payment in full of all persons owning property in the affected area; the release of the County and State from the obligations of law enforcement, public health preservation and education; the liquidation of most of the bonds on which Swain County was obligated with respect to the financing of Highway 288; the extension of the Great Smoky Mountains National Park substantially to its original boundaries; and the construction at a future date of a parkway which was contemplated in the Master Plan of the National Park Service for the Great Smoky Mountains National Park and which would

[8] Respondents alone claim dissatisfaction with this plan but it is apparent that their present position is founded on the hope that the 35,000 acres already acquired by the Authority (R. 34) will be incorporated into the Great Smoky Mountains National Park and that the Park Service will build a road through the area. Respondent Welch, the only respondent who testified, admitted as much (R. 99). Surrounded by a national park and served by a parkway, their lands would be a recreational paradise. At the same time, all of the respondents, except Welch and Burns who have waived that right, would recover substantial damages for the taking of their easements of access.

also accommodate the through traffic previously served by Highway 288.

Beyond this, the Authority's Board of Directors also considered the fact, undisputed on this record (R. 94, 99), that the flooding of Highway 288 substantially destroyed the value of respondents' lands and the liability thereby incurred by petitioner would have approximated the value of the fee. Cf. *Schiefelbein* v. *United States*, 124 F. 2d 945 (C. C. A. 8); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297 (C. C. A. 8); *Hiatt* v. *City of Greensboro*, 201 N. C. 515; *Davis* v. *Alexander*, 202 N. C. 130; see annotations, 49 A. L. R. 330 and 93 A. L. R. 639.

There is no finding that the determination of the Authority's Board of Directors, that the condemnation of respondents' lands was necessary in order to carry out the purposes of the Tennessee Valley Authority Act, was made in bad faith or constituted an abuse of discretion. On the contrary the district court expressly found that the determination was made in good faith and it repeatedly commented that it thought the plan was a good one.[9] Nevertheless the court below held

[9] "The COURT. I think it's a fine plan, everything you did, and I thoroughly approve of it" (R. 81). "The COURT. I think your plan was good, and it is going to work out well if you can just get the land that belongs to these fellows here" (R. 89).

that while petitioner could condemn the respondents' easements of access, the lands themselves "were not needed for any purpose authorized by the statute" (R. 207).

In thus rejecting the Board's good faith determination of necessity, the decision below is in conflict with the decisions of this Court in *Rindge Co.* v. *Los Angeles County,* 262 U. S. 700, 708–710; *Joslin Co.* v. *Providence,* 262 U. S. 668; *Bragg* v. *Weaver,* 251 U. S. 57; *Sears* v. *Akron,* 246 U. S. 242; *Shoemaker* v. *United States,* 147 U. S. 282; and *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668. The intrusion of the court below into the legislative task, delegated to the Authority's Board of Directors, of determining the necessity for a taking is also in conflict with the decisions in *United States* v. *Meyer,* 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; *Barnidge* v. *United States,* 101 F. 2d 295 (C. C. A. 8); *United States* v. *Threlkeld,* 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; and *Atlantic Coast Line R. Co.* v. *Town of Sebring,* 12 F. 2d 679 (C. C. A. 5). The conflict with *United States* v. *Meyer, supra,* is particularly striking. See *supra,* pp. 10–11. In that case, the landowners claimed that the operation of the dam completely destroyed their lands, and the court, in language apt with reference to the proof in this case that the flooding of Highway 288

made respondents' lands practically valueless (see *supra*, pp. 3, 6, 15), said (113 F. 2d at 392):

> If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite.

It is true that the circuit court of appeals in this case accorded verbal recognition to the rule announced in the above cases when it noted that "ordinarily, the necessity of a taking for public use is a legislative and not a judicial question and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts." (R. 206–207.) But in the face of the court's articulated rejection of the Authority's decision as to necessity, such a statement does not serve to forestall the confusion which will follow upon the conflict of judgments so created.

3. The holding of the court below that the taking of respondents' lands was "for a private use, or at most for a public use not authorized by statute" (R. 206) conflicts in principle with the decisions of this Court in *Brown* v. *United States*, 263 U. S. 78, and *Dohany* v. *Rogers*, 281 U. S. 362. We have already adverted to the statutory authorization for the condemnation here involved (see *supra*, pp. 11–13) and are thus here concerned only with whether the taking is for a public or private use. In the *Brown* case, this Court held that the acquisition of a town site to

replace a town partially flooded by an authorized reservoir was a taking for a public use, even though, as an incident of the readjustment, some of the tracts taken may be found to be surplus lots and may have to be sold. In language bearing closely on the case at bar, this Court said (263 U. S. at 81):

> the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site. * * *
>
> * * * It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.

The general purport of the *Brown* decision, significant here, is that where the taking of land is "a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation" (263 U. S., at 84), it is sustainable as a taking for a public use. In *Dohany* v. *Rogers, supra,* condemnation of an interest in land to be used for the relocation of a railroad right of way eliminated by a state highway project was upheld, this Court noting (281 U. S. at 366) that "It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public high-

way as to be for a public use." Here, the taking of a fee interest in respondents' lands was a practical and preferable alternative to either the condemnation of the highway and the taking of the easements of access or the rebuilding of the highway. Either of these alternatives, the court below conceded (R. 207, 209), would have been legitimate. We submit that the plan chosen is no less necessary a "step in the public improvement itself," and cannot, with any accuracy, be described as "excess condemnation" (cf. R. 207).

Contrary to the statement of the court below (R. 208–209), *Brown* v. *United States, supra,* and *Dohany* v. *Rogers, supra,* are not distinguishable on the ground that in those cases that which was taken to afford substitute compensation was the same "sort of thing" as the subject of the original taking. In those cases strangers to the original project were subjected to the condemnation power as a means of compensation; here respondents' lands had already been rendered practically valueless by the concededly authorized taking of their easements of access, and the condemnation of their fee interests as a means of compensation not only to the State but to respondents themselves had a closer relationship, therefore, to the original project than did the takings involved in the *Brown* and *Dohany* cases.

4. The issue in this case is one of great importance to Government agencies engaged in the construction of dams and reservoirs. That the prob-

lems that have arisen are not peculiar to this particular project, but are, on the other hand, typical, is apparent from the experience referred to in the House Military Affairs Committee report on Section 31 of the Tennessee Valley Authority Act. See *supra*, p. 13.

An intelligent handling of the problems of readjustment arising out of the flooding of lands by an authorized dam can be had only if the Governmental agency which must deal with such problems is not too closely confined with respect to the particular means which may be adopted in their solution. Whether condemnation of the fee or only of an easement is necessary, is a question which often turns on how the property can be put to its maximum use and the interest of local governmental bodies in the disposition of the property. Unless the judgment of the court below is reviewed and reversed, such practical considerations will often have to be ignored.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1945.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 528

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH [1]

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the District Court (R. 8–13) are not reported. The opinion of the Circuit Court of Appeals (R. 124–133) is reported at 150 F. 2d 613.

[1] Together with No. 529, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *John Burns, et al.*; No. 530, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Fred Lollis, et al.*; No. 531, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Arnold E. Bradshaw, et al.*; No. 532, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Philip G. Rust, et al.*; and No. 533, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Abraham Cole Hyatt, et al.*

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on July 21, 1945 (R. 133, 135, 136–137, 138, 140, 141–142). The petition for writs of certiorari was filed on October 19, 1945, and was granted on December 10, 1945 (R. 144). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

Whether, when respondents' easements of access have been taken and destroyed by the Tennessee Valley Authority's permanent flooding of the only highway serving their properties, a court can set aside the determination of the Board of Directors of the Authority, made in good faith and after a careful evaluation of all available alternatives, that the taking of the fee in respondents' properties is necessary to carry out the provisions and purposes of the Tennessee Valley Authority Act.

STATUTE INVOLVED

The provisions of the Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended (16 U. S. C. 831–831dd) appear in the record (pp. 65–95).

STATEMENT

The United States of America, on behalf of the Tennessee Valley Authority, filed in the United States District Court for the Western District of North Carolina six separate petitions

to condemn the lands of respondents. The answers of respondents denied the right of petitioner to take the lands, and the cases were tried on the sole issue of whether petitioner has the legal power to take them. By agreement of the parties, the *Welch* and *Burns* cases were tried together (R. 8). The *Rust, Bradshaw, Lollis,* and *Hyatt* cases were likewise consolidated for purposes of trial and were tried together on the record in the *Welch* and *Burns* cases and some additional proof (R. 10, 25–28).

None of the basic facts are in dispute. Under the powers conferred upon it by the Tennessee Valley Authority Act of 1933, as amended, the Tennessee Valley Authority has constructed Fontana Dam and Reservoir on the Little Tennessee River in western North Carolina (R. 14). Lying between this reservoir and the Great Smoky Mountains National Park is a mountainous area of approximately 44,000 acres, originally scheduled for inclusion in the park (R. 39) and inhabited prior to the construction of the dam by 216 families (R. 56). It was served by North Carolina State Highway No. 288, a road approximately 50 miles in length running through extremely rugged country from Deals Gap to Bryson City (R. 15, 38; Pet. Ex. 3, R. 30, 146; Pet. Ex. 4, R. 37, 147). The reservoir flooded this highway throughout most of its length and has rendered the area served by it inaccessible except by water and by foot trails (R. 15).

Fontana Dam is a massive structure ranking fourth in height and volume of concrete among water control structures in the world. Built at a cost of more than $65,000,000, it is 480 feet high and contains more than 2,800,000 cubic yards of concrete. The reservoir created by the dam is 29 miles long and contains 1,100,000 acre-feet of useful storage. The project is operated as a part of the Authority's navigation, flood control, and hydroelectric system. The storage capacity is utilized for the prevention of floods, not alone on the Tennessee River but also on the lower Ohio and Mississippi Rivers. Since the project is located on a headwater tributary of the Tennessee River, the stored water is successively utilized for power purposes not only at its own powerhouse but also at ten dams which lie below it on the Little Tennessee and Tennessee Rivers. *Annual Report of the Tennessee Valley Authority for the Fiscal Year Ending June 30, 1945,* filed pursuant to § 9 (a) of the Act, pp. 35, 39, 234. The project will have an installed generating capacity of 200,000 kilowatts and adds 165,000 kilowatts of continuous power to the Authority's system. H. Rep. 1470, 77th Cong., 1st sess., p. 25. Although the dam was a part of the Authority's long-range multipurpose program, the immediate occasion for its authorization in 1942 was to meet urgent power requirements for war production in the Tennessee Valley area. H. Rep. 1470, 77th Cong., 1st sess., p. 25.

State Highway No. 288 was owned and maintained by North Carolina but had originally been financed by bond issues upon which Swain County, North Carolina, was obligated (R. 15). It was a gravel road, narrow, tortuous, and dangerous, and far below modern standards of highway construction (R. 21, 23). It carried practically no through traffic (R. 59), and the State Highway Commission felt that its original construction had been a waste of money (R. 53). Its flooding, however, created a variety of problems, and the State of North Carolina and Swain County demanded that some action be taken to protect them (R. 15). To replace it with a road of similar quality would have cost approximately $1,400,000 (R. 21, 41), and both the State and petitioner felt that such an expenditure would not be a wise or efficient use of public funds (R. 52–53, 57, 63, 100). It soon appeared also that reconstruction of Highway No. 288 was probably impossible, since the War Production Board informally advised the Authority that the reconstruction of the highway was not sufficiently important to justify the expenditure of materials and manpower required (R. 48, 53, 63, 100).[2] The necessary

[2] The finding of the district court was that "the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised" (R. 15, 22).

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equipment and material could not have been obtained under the circumstances then existing without the active assistance of the War Production Board (R. 22).

Purchase or condemnation of the legal interests of the State and the landowners in the road would have produced serious social and economic problems since the absence of roads would have made it impossible to provide adequate schools, markets, police protection, health services, or fire control within the area formerly served by the highway (R. 58). Largely for this reason the State refused to consider any settlement which would leave these lands in possession of the occupants without adequate roads (R. 42–43, 49–50). The value of the interest of the State, if it had been acquired by condemnation, would presumably have been measured by the $1,400,000 cost of rebuilding the road (see *infra*, p. 39). The acquisition of the easements of access appurtenant to the lands served by the road would have cost substantially as much as the fee (R. 58–61)—about $775,000 (R. 65). This means of dealing with the problem would, therefore, have required an expenditure of over two million dollars, approximately twice that of the solution adopted, while creating an isolated area with its attendant social and economic problems.

The State insisted that all of the area served by the highway be taken out of private ownership

if Highway 288 was not to be reconstructed since it wanted assurance that it would not need to construct new facilities to replace it. It also insisted that any solution adopted be satisfactory to Swain County. (R. 42–43, 48, 57.)

The solution finally determined upon, which was worked out after 1½ years of consideration and negotiation (R. 51) and after securing the approval of the Governor, the Council of State, and the Legislature of the State of North Carolina (R. 48–49), was embodied in a settlement contract between the State, the County, the National Park Service, and the Authority (R. 99–113). The essential provision in the agreement is that, in consideration of the release by the State and County of all claims arising out of the flooding of Highway No. 288, the Authority must acquire all of the land previously served by the highway, with the exception of some mining property, either by voluntary acquisition or by condemnation, so as to relieve the State of the necessity of providing access to these properties (R. 101–103, 110–111).[3] The contract also provides for the transfer of the lands so acquired to the

[3] The contract excepted the lands belonging to the North Carolina Exploration Company (R. 102). Acquisition of the tract owned by the North Carolina Mining Corporation was permitted to be postponed until a date six months after the cessation of hostilities because the parties recognized that the mining of this tract of land might be of importance to the prosecution of the war (R. 102–103).

National Park Service for inclusion within the boundaries of the Great Smoky Mountains National Park (R. 63, 103–105) and for the construction by the Park Service, whenever funds are made available by Congress, of a parkway through the area as contemplated in the master plan evolved by the National Park Service for the development of the Park (R. 64, 105–107). The State agrees to contribute $100,000 to aid in the acquisition of the land (R. 64, 109), and the Authority agrees to pay Swain County $400,000 to be used in retiring a portion of the road bonds (R. 64, 109).

The problem arising out of the flooding of Highway No. 288 was one of the most difficult and complicated readjustment problems encountered during the construction program of the Tennessee Valley Authority (R. 56). It was the subject of extensive study by the Authority's staff, and when the contract of settlement was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendations of its staff which described the situation above outlined and the reasons for the proposed contract (R. 14, 15–16, 21, 61–65). Upon the basis of the report and recommendations, the Board, on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority.

With respect to the fee interest in the lands served by Highway No. 288 and owned by respondents, the Board passed identical resolutions affecting the several tracts, stating that:

> * * * the acquisition of the aforesaid interests in the aforesaid tracts of land by the Tennessee Valley Authority is deemed by the Board to be necessary for the carrying out of the provisions and purposes of the Tennessee Valley Authority Act of 1933 [R. 61–62].

These determinations were made in good faith (R. 14, 21).

The Authority purchased all the lands which the contract required it to acquire except the tracts owned by the respondents (R. 21, 127–128, 146, 147). Apart from about 1½ acres of land owned by respondent Welch as to which there is no controversy (R. 16), none of the respondents' lands were flooded by the impounding of the waters of Fontana Dam, but the rights of access of all were taken by the flooding of Highway No. 288 (R. 15, 21).

The District Court, after hearing proof, rendered opinions holding that petitioner is without legal power to take any of the lands except the acre and one-half owned by respondent Welch which was actually flooded (R. 8–13); made findings of fact (R. 14–25); and entered judgments dismissing the condemnation petitions and

striking its former orders placing petitioner in possession of the lands (R. 1–7).[4]

Upon stipulation of the parties, the six cases were consolidated for purposes of petitioner's appeal (R. 27–28). The Circuit Court of Appeals affirmed the judgments of the district court.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the petitioner was without legal power to condemn respondents' lands;

2. In holding that the Tennessee Valley Authority Act does not confer upon petitioner the legal power to acquire respondents' lands;

3. In holding, in effect, that the question of the necessity for the taking of lands is a judicial question;

4. In holding that petitioner cannot legally condemn a fee interest in lands when, in the opinion of the court, an easement would be sufficient to meet its requirements;

5. In holding that the court can review a determination made in good faith by the Board of Directors of the Tennessee Valley Authority as

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[4] As to respondent Welch, the order of possession was modified to authorize continued possession only of the small tract actually flooded (R. 2). The judgments in the cases of respondents Welch and Burns ordered the landowners to release their rights to any recompense for the flooding of the highway and the consequent taking of their rights of access (R. 1–2, 3–4). This was done with the consent of these respondents (R. 8, 9).

to the necessity for the acquisition of an interest in land and substitute its determination for that of the Board of Directors;

6. In holding that the lands were taken by petitioner for the purpose of transferring them to the National Park Service, Department of the Interior;

7. In holding that the lands were not taken for a public use; and

8. In holding that the Federal Government may not condemn a fee interest in lands even though an authorized taking by the Government has substantially destroyed the value of the lands and the owners are entitled to compensation for the taking.

SUMMARY OF ARGUMENT

I

The Tennessee Valley Authority Act confers upon the petitioner the full constitutional power of the Federal Government to condemn lands for purposes of the Act. The Act as a whole indicates that Congress intended to confer wide discretionary power upon the Tennessee Valley Authority and confers the power of eminent domain in the broadest terms. Sections 4 (i) and 25 authorize the condemnation of any lands deemed by the Authority to be necessary for carrying out the provisions and purposes of the Act. That Congress contemplated acquisition by the Authority of lands not actually flooded appears from various sections of the Act, particularly Section 4

(k), which authorizes it to dispose of lands for specified purposes, including the operation of pleasure resorts and the erection of docks and buildings for shipping, storage, and manufacturing enterprises. Section 31 provides that the Act shall be liberally construed. Nor is the Authority's power to condemn land less broad than its power to purchase; for it is the policy of Congress, expressed in the general condemnation statute and applicable here, to authorize the condemnation of any lands which there is authority to purchase.

II

The taking here in question is within the Federal Government's power of eminent domain. This Court has held that in the construction of dams and reservoirs the Government is not limited to condemning the lands upon which its projects are to be physically located but can constitutionally condemn whatever lands are reasonably necessary to solve the resulting social and economic, as well as physical, problems. The acquisition of respondents' lands is necessary to resolve by the most effective and desirable means at hand the social and economic problems which result from the construction of the project and, we submit, is more closely connected with the Fontana Reservoir project than was the case in previous instances of condemnation which have

been sustained. The use of the lands here contemplated is a public use incident to the reservoir project.

III

The decision of the Board of Directors of the Tennessee Valley Authority to enter into the contract of settlement requiring the acquisition of respondents' lands was made in good faith and after careful consideration of all relevant information. If power to acquire such lands exists, the court below erred in inquiring into the necessity for the taking, since it is settled by numerous decisions of this Court that the necessity of a taking for a public use is a legislative and not a judicial question.

ARGUMENT

Introductory

By the flooding of Highway No. 288, petitioner incurred two sets of liabilities—liability to the individual landowners for the taking of the easements of access appurtenant to their lands, and liability to the State of North Carolina for the taking of its interest in the highway. The satisfaction of both sets of liabilities could conceivably have been accomplished by the adoption of one of three alternatives: (1) reconstruction of the highway above the level of the reservoir, (2) purchase or condemnation of the landowners' easements and the State's interest in the highway, or (3) purchase

or condemnation of the fee title to the lands served by the highway and a release of the State's interest in the highway.

As the facts already stated demonstrate, the first two alternatives were not feasible. The reconstruction of the highway would have required the use of 500,000 man-hours of labor and a very large amount of material and equipment (R. 21-22, 41) in an area in which the manpower and housing situations were critical during the war, thereby delaying completion of the Fontana project (R. 57) which was urgently required for war purposes;[5] and the War Production Board had informally advised the Authority that it would not grant the necessary priorities (R. 48, 53–54, 63, 100). This solution would have been an undesirable one in any event, involving the expenditure of $1,400,000 for the reconstruction of a road that the State felt would involve a waste of money (R. 52–53). The second alternative would have been even more expensive (see *supra*, p. 6) and would have created intolerable social and economic conditions by leaving unsolved the problems caused by the elimination of the only road serving an inhabited territory.

The adoption of the third alternative and the acquisition of the fee instead of simply the ease-

[5] See Hearings before Subcommittee of House Committee on Appropriations, 77th Cong., 1st sess. on Third Supplemental National Defense Appropriation Bill for 1942, part 1, pp. 565, 575–577.

ments of access appurtenant to the lands served by the highway effected a settlement whereby:

(1) The Tennessee Valley Authority extinguished all of the liabilities incurred by flooding Highway No. 288 for approximately $1,075,000;

(2) The wishes of the State, the County, and the vast majority of the landowners were respected;

(3) The people who lived in the affected area were paid in full for their property and enabled to relocate in communities where the ordinary governmental and economic services are available;

(4) The county, state, and national governments were relieved of the responsibility of law enforcement, public health, and education in an area in which such services could not have been adequately provided; and

(5) Swain County was enabled to pay off most of the bonds which had been issued to pay for the original construction of Highway No. 288.

Additional and incidental benefits derived from the settlement are the completion of the Great Smoky Mountains National Park to its original boundaries without cost to the Park Service and provision for the construction at a future date of a parkway which is an integral part of the master plan of the Park Service for the development of the Park and which will also serve as a through road from Deals Gap to Bryson City.

I

The Tennessee Valley Authority Act confers upon petitioner the full constitutional power of the Federal Government to condemn lands for the purposes of the Act

The Tennessee Valley Authority is a corporation charged by Congress with responsibility for a program of regional development, including the harnessing of the Tennessee River for navigation, flood control, and electric power; the production of munitions; fertilizer manufacture, research and demonstration; soil conservation; reforestation; and research designed to foster the orderly physical, social, and economic development of the Tennessee Valley and adjoining areas (R. 65–95). To enable it to carry out this program, the Tennessee Valley Authority was relieved of many of the restrictions generally applicable to Government agencies and was given a broad discretion in the choice of means suitable for attaining its statutory objectives.* The grant of the power of eminent domain is consistent with this congressional policy of conferring upon the Board of Directors of the Tennessee Valley Authority the discretion necessary to enable it to perform efficiently the duties imposed upon it by the act.

The power of condemnation is granted in sections 4 (i) and 25 of the act in the broadest terms. Section 4 (i) provides that the Corporation—

* See, for example, sections 3 (R. 68), 4 (a)–4 (g) (R. 69), 9 (b) (R. 75–77), and 26 (R. 93–94) of the Tennessee Valley Authority Act.

> Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and *to condemn all property that it deems necessary for carrying out the purposes of this Act* * * * [R. 69; italics supplied].

Section 25 provides that

> The Corporation may cause proceedings to be instituted for the acquisition by condemnation of *any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act.* * * * [R. 91; italics supplied.]

There is nothing in the foregoing sections to indicate that Congress intended to restrict in any way the power granted to the Tennessee Valley Authority to condemn property for the purposes of the Tennessee Valley Authority Act, and, indeed, it is difficult to see how the power of eminent domain could have been conferred in any broader terms. The only requirement is that the Authority find that the acquisition of the prop-

erty is necessary to carry out the purposes of the Tennessee Valley Authority Act. Findings to that effect were made in good faith in these cases by the Authority's Board of Directors (R. 14, 21; Pet. Exs. 1, 2, 2a, 2b, R. 61).

In several sections of the Act Congress has expressly recognized that in the acquisition of reservoir sites the Authority may find it necessary to acquire lands not actually flooded. Thus, section 4 (l) authorizes it to cooperate in the readjustment of the population displaced by "construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land * * *." (R. 71.)[7] Section 4 (k) authorizes the Tennessee Valley Authority to dispose of lands acquired by it for various purposes, including the operation of pleasure resorts for boating, fishing, and bathing, the erection of docks and buildings for shipping purposes, or for

[7] This section was added to the act by amendments in 1935 (49 Stat. 1080). The content of the term "protection of watersheds" can best be explained by reference to the Annual Reports of the Tennessee Valley Authority for the years 1934 (p. 14) and 1935 (p. 8). In the latter report the Authority's Board of Directors pointed out that substantial acreages had been acquired above the maximum pool elevation of the Norris Reservoir, the first project constructed by the Authority, in order to provide a protective strip around the reservoir. Additional lands were also acquired to avoid claims for severance damages or because it was cheaper to acquire the land than to provide access facilities in certain peninsular areas.

manufacture or storage of products to be shipped. Section 31 provides that

> * * * any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4 (k) of this Act [. 95].

The legislative history of Section 31 shows that Congress understood and intended that in the settlement of reservoir problems the Authority would acquire land which would not be incorporated into any project and would not be needed after the reservoir problems had been solved. Added by amendments adopted in 1935 (49 Stat. 1075, 1080), this section of the Act, as reported by the House Committee on Military Affairs (§ 11 of the bill as reported), prohibited the acquisition as well as the retention of any land not "actually necessary to carry out the plans and projects actually decided upon requiring the use of such land" (H. Rep. 1372, 74th Cong., 1st sess., p. 22). But in a supplemental report, Representatives Kvale and Maverick pointed out that "in the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line" (*id.* at 33) and further stated that

> * * * in some sections in the reservoir areas, little peninsulas of land are neces-

> sarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the land in peninsulas than to construct new roads along the steep mountain sides. * * *
> * * * to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project [*ibid.*].

The prohibition against acquisition contained in Section 31, as reported out by the House Committee, was eliminated in the section as finally adopted, and the prohibition against retention of land was modified to its present form, leaving the determination as to the necessity for retention in the discretion of the Board (§ 12 of the bill as adopted; H. Rep. 1846, 74th Cong., 1st sess., pp. 6, 9). In the light of this legislative history, the elimination of the prohibition against acquiring lands "not actually necessary to carry out plans and projects actually decided upon" can only be construed as a recognition and affirmation of the power to take lands related to but not physically a part of the Authority's projects.

To insure that the Authority would not be hampered by narrow construction of the powers vested in it, Congress provided in Section 31 that—

> This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Gov-

> ernment properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods and promote interstate commerce and the general welfare * * * [R. 95].

In Section 4 (g) Congress conferred upon the Authority

> * * * such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation [R. 69].

We think it is clear, then, that Congress, far from limiting the power of condemnation delegated to the Tennessee Valley Authority, has granted to it the full constitutional powers of the Federal Government to take property for all the purposes of the Tennessee Valley Authority Act.

It would be unsound to construe the Act to permit the taking of only such lands as are actually flooded or to be physically occupied by a structure. A similar contention was rejected in *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706. There it was urged that the Secretary of War under the Rivers and Harbors Act of 1888 was authorized to take only flowage easements over land covered by water. Although the statute, which authorized the Secretary of War to condemn "any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improve-

ment of rivers and harbors for which provision has been made by law", was certainly no broader than the Tennessee Valley Authority Act, the court sustained the taking of the fee in lands not flooded (113 F. 2d at 392), stating that "The power thus granted is unlimited and we cannot read into it limitations not clearly indicated by Congress" (113 F. 2d at 391–392). We submit that the same conclusion is applicable here.

In the brief in opposition (pp. 23–28) respondents contend that, even if the Tennessee Valley Authority has the legal power to purchase lands which are rendered inaccessible if, in the opinion of its Board of Directors the acquisition of the lands is more feasible than the replacement of the highways which formerly served them, Congress has not conferred the power to condemn such lands. At p. 25 of the brief it is said:

> It is, of course, elementary that there is a vast distinction between the right or authority, on the one hand, to purchase land and the power, on the other, to condemn it. The right to *purchase* private property from willing sellers is, of course, given by Congress in many instances where a taking against the owner's will would not be authorized by the Act, or condoned by the Courts.

This distinction finds no support in the Acts of Congress or the decisions of this Court. It is the established policy of Congress to confer upon

administrative agencies a power of condemnation co-extensive with their power to purchase. This policy finds expression in the general condemnation Act of August 1, 1888, 25 Stat. 357, as amended, 40 U. S. C. 257, which provides that whenever an officer of the Government "has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation. * * *."

In *Hanson Co.* v. *United States*, 261 U. S. 581, this Court held that "the authority to condemn conferred by the last mentioned act extends to every case in which an officer of the Government is authorized to procure real estate for public uses" (p. 587), and that the powers conferred thereby are in addition to the powers conferred by other statutes. Accord, *Barnidge* v. *United States*, 101 F. 2d 295 (C. C. A. 8); *United States* v. *Threlkeld*, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620. The reasons of policy behind the Act are explained in the *Hanson* case as follows:

> It would have been futile to authorize the purchase of an essential part of a great project, withholding power to condemn, and so leave it within the power of the owner to defeat the program by demanding a price in excess of $65,000 or by refusing to sell at all. The argument is without force [p. 586].

In view of the established policy of Congress set forth in the Act of August 1, 1888, as applied by this Court, it seems clear that if Congress had intended to restrict the use of the condemnation power in the acquisition of land which the Tennessee Valley Authority is authorized to purchase, it would have said so in unmistakable terms. In the absence of an express restriction in the Act, there is no basis in policy or authority for confining the condemnation power under the Tennessee Valley Authority Act within narrower limits than those prescribed by the Act of August 1, 1888, especially since the Authority could proceed under the latter Act to condemn any land which it is authorized to purchase.

II

The taking of respondents' lands is a valid exercise of the constitutional power to take land for reservoir purposes

The decision of the court below is based largely upon the view that the constitutional power to condemn lands for reservoir purposes is not sufficiently broad to permit the taking of the lands of respondents. On the theory that respondents' lands are not necessary for the Fontana project, it holds that they are being taken "not for the public use for which the statute gives the right

of condemnation, but for a private use, or at most for a public use [incorporation in a national park] not authorized by statute" (R. 129). The court states that the constitutional power to condemn land for reservoir purposes permits the Federal Government to acquire only lands actually flooded or needed for materials, plus the easements necessary to relocate flooded highways and similar facilities (R. 126, 130, 132). The opinion may be summarized as follows: If the taking of respondents' lands is interpreted as a taking for national park purposes, there is constitutional power but no statutory authority; if the taking is interpreted as a taking for reservoir purposes, there is a complete lack of constitutional power, and the taking is not for a public use. Petitioner, however, has never contended that the Tennessee Valley Authority has statutory power to acquire lands for national park purposes, and the question presented is therefore whether the court below has correctly defined the scope of the Federal Government's constitutional power to condemn land for reservoir purposes.

To limit the constitutional power to take lands for a reservoir project so narrowly as to permit the condemnation only of lands physically part of the project would seriously hamper the construction of projects and gravely limit the accomplishment of programs of internal improvement. The contours of a reservoir rarely conform to

the boundary lines between private owners, and such an interpretation would require the Government in many cases to leave farmers with remainders insufficient to support families, without permitting it to acquire their entire farms so as to enable them to relocate elsewhere. It would also require that families be left on little peninsulas or on islands, without adequate means of access, or that the Government incur disproportionate and extravagant expense in building highways or constructing bridges to reach them.

A large reservoir project may flood many square miles of land, inundating highways and railroads, water and sewage mains, power lines and other utility facilities, courthouses, schools, and even whole towns or villages. The final settlement of the multitude of problems arising out of the flooding of these structures and facilities is as necessary to final completion of the project as the concrete that goes into the dam (cf. R. 37–38, 55–56). There is no single or simple answer to all of these problems. Sometimes cash payments will suffice. More frequently it is necessary to provide substitute facilities or to assist landowners in other ways to adjust to the changed conditions caused by the flooding. The solutions to these problems, which are an integral part of the project, may be the most difficult part of the over-all job. The solution of each problem must be tailor-made and requires the combined efforts of a staff of experts in highway, railroad, sanita-

tion, and other engineering problems, agriculture, community planning, and other fields. In settling these problems, it is essential that those charged by Congress with the administration of a project be given sufficient discretion to permit them to effect wise and economical solutions.

It may be suggested that the Government should ignore the social and economic problems caused by the construction of the reservoirs, the desires and interests of the State, the County, and other agencies of local government, as well as those of the landowners; but we cannot believe that the Constitution requires the Federal Government to follow such an irresponsible course. It could hardly be argued that the Federal Government, having spent millions of dollars on the construction of a project, may not take the steps necessary to heal the physical scars of construction so as to render the approaches and immediate surroundings reasonably attractive, as state authorities are empowered to do.[8] The prevention of the social and economic dislocations which would result from leaving an isolated area in which ordinary governmental services could not be effectively provided would seem to be at least equally important and equally within the power of the constructing agency to deal with.

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[8] See *In re City of New York*, 57 App. Div. 166, 68 N. Y. Supp. 196; *Curran* v. *Guilfoyle*, 38 App. Div. 82, 55 N. Y. Supp. 1018; *University of So. Calif.* v. *Robbins*, 1 Cal. App. 2d 523.

We are not forced to a consideration of hypothetical cases to illustrate the results which would flow from the approval by this Court of the doctrine enunciated by the court below. The case at bar illustrates graphically the evils which would result from denying to the administrators charged with responsibility the flexible powers necessary to solve the resulting problems. The court below concedes that petitioner might either have reconstructed Highway No. 288 or have acquired by purchase or condemnation the interests of the State of North Carolina in the highway and the easements of access appurtenant to the lands of respondents and other lands which the highway served (R. 130, 132). As we have pointed out, however, neither of these alternatives presented a practical solution to the problem. The first was probably impossible in wartime (see *supra*, p. 5), while the other was equally undesirable because it would have left unsolved the very problems with which it was necessary to cope. The provision of adequate schools, markets, health services, police protection, or means of fire control to a small and sparsely inhabited area accessible only by water and by foot trails would obviously have been impossible. It must be assumed that many of the 216 families would have moved out of the area, and it is difficult to see how any of the foregoing services could be provided for those who would remain, scattered as they would be over 65 square miles of mountainous land (Pet. Ex. 3, R. 30–31,

146). It is not surprising, therefore, that the undisputed evidence shows that failure to reconstruct the highway or to acquire the lands served by it in fee "would produce intolerable social and economic problems" (R. 58). Neither is it surprising that the State would not consider any settlement that would permit such a result (R. 42–43, 49–50).

There is no support in the decisions of this Court for the narrow view of the scope of the power of eminent domain adopted by the court below. The power of condemnation possessed by the Federal Government is an essential element of sovereignty, as broad "as is necessary to the enjoyment of the powers conferred upon it by the Constitution" (*Kohl* v. *United States*, 91 U. S. 367, 372). See also *Hanson* v. *United States*, *supra*. The Court has long since held that this power, like the scope permitted to the corresponding powers of the States by the Fourteenth Amendment, is not limited to the acquisition of property which is to be physically occupied by a public improvement but extends to the taking of any lands the acquisition of which bears a reasonable relation to the completion of the project.

In *Brown* v. *United States*, 263 U. S. 78, in a situation closely analogous to the case at bar, it was held that the acquisition by the United States of a town site to replace the portion of a town flooded by an authorized reservoir was a taking for a public use even though as an incident to

the readjustment some of the tracts acquired might be found to be surplus lots and would therefore be sold. The Court rejected a contention "that the power of eminent domain does not extend to the taking of one man's property to sell it to another," holding that "it was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one" because

> * * * the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site [263 U. S. at 81].

In *Dohany* v. *Rogers*, 281 U. S. 362, this Court upheld the condemnation of an interest in land to be used for the relocation of a railroad right-of-way which in turn was being taken by the State of Michigan for use in a highway project, upon the ground that

> It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use [281 U. S. at 366].

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[9] *Accord*, *Weyel* v. *Lower Colorado River Authority*, 121 S. W. 2d 1032 (Tex. Civ. App.); *Town of Cookeville* v. *Farley*, 171 Tenn. 260; *Fitzsimons & Galvin, Inc.* v. *Rogers*, 243 Mich. 649; *Harter Bank* v. *Washington Watershed C. Dist.*, 53 Ohio App. 325.

It is thus established that private property which will not be physically incorporated in a public project may be condemned as necessary to the project in order to replace public utilities which are being destroyed.

In the *Brown* case this Court went even further by holding that private property as well as public utilities may be replaced, citing *Pitznogle* v. *Western Maryland R. R. Co.*, 119 Md. 673, which sustained a condemnation to replace a private right-of-way that had been the only means of access of certain landowners to a public highway, 263 U. S. at 83. Upon the theory implicit in the *Pitznogle* decision, the *Brown* case holds that private property may be taken for the purpose of transferring it to other property owners whose holdings are being destroyed by a public improvement.

The foregoing cases are indistinguishable in principle from the case at bar. They hold that land not physically occupied by a project can nevertheless be condemned if its acquisition is necessary to solve the relocation problems created by the construction of the project. If the contemplated uses of the land involved in the *Brown* and *Dohany* cases bring the acquisition of property within the power of eminent domain, we submit that the condemnation of respondents' property falls equally within that power. The court below attempted to distinguish the *Brown* and *Dohany* cases upon the ground that there the

purpose was "to obtain for another the sort of thing that has been taken from him" (R. 132). But constitutional questions relating to the power of the Federal Government should not turn upon such arbitrary distinctions. The taking of the fee interest in respondents' lands has a much closer relationship to the authorized project than did the takings involved in the cited decisions. In the *Brown* and *Dohany* cases, lands which were unaffected by the projects were taken in order to overcome the effects upon other property. Here, respondents' lands themselves are directly affected by the project since they have been rendered largely useless by the concededly authorized taking of the easements of access. The taking of the fee is therefore one step nearer to the reservoir project than would be the taking of the lands of strangers in order to construct roads to provide access to respondents' lands, as the court below concedes that petitioner could properly do (R. 132). The owners of such lands could much more plausibly contend that their property was not being taken for a relevant public use than can the respondents in this case.

In *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706, the landowners contested the right of the United States to take the fee simple title to property only part of which would be flooded, asserting, as do respondents here, that an easement over land actually flooded was sufficient for the Government's

purposes and that the fee was being taken so that the land could be devoted to recreational purposes. They also contended, with what the court apparently considered to be some inconsistency, that their lands would be completely destroyed by the operation of the dam. The court held that the Government could acquire the fee simple title to all the land, including the part not flooded, and that since the original taking was for purposes of navigation and flood control, its validity would not be affected by plans for the subsequent use of the property for recreational purposes. Commenting on defendants' contention that the operation of the dam would completely destroy the lands, it stated:

> If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite [113 F. 2d at 392].[10]

Upon the same theory, it has been determined that "remnant lots" of little or no value, created

[10] It is settled that upon the physical taking of land by the Federal Government, title automatically vests in the United States, the owner thereafter being relegated to a claim for compensation for the taking. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445; *Hurley* v. *Kincaid*, 285 U. S. 95. Since it is undisputed that the flooding of the highway substantially destroyed the value of the lands served by it (R. 58, 61), the decision of this Court in *United States* v. *Lynah* suggests that petitioner, far from being without the constitutional power to acquire the fee in respondents' lands, may have already acquired the fee title by operation of law by taking the easement of access appurtenant to them and thus

by a public improvement, may be condemned along with the land occupied by the improvement. *Armstrong* v. *City of Detroit,* 286 Mich. 277; *Emmons* v. *City of Detroit,* 261 Mich. 455, affirming 255 Mich. 558; *City of Chicago* v. *McCluer,* 339 Ill. 610. In the case at bar, as respondents concede (Br. in Opp. 14), the lands have been rendered practically valueless by the taking

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destroying their value. In the *Lynah* case, this Court stated the rule as follows:

"It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner" (188 U. S. at 470–471).

The *Lynah* case involved a rice plantation which had become a virtually irreclaimable bog as a result of navigation improvements in the Savannah River. The ruling of the Court that a taking of the fee occurred was based on its conclusion that the damage to the land could not be remedied without disproportionate expense. On this basis, it distinguished *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.), which held that there was no taking under facts which were similar except that the rice plantation could be protected by an expenditure of $10,000. The prohibitive cost of access to the lands in suit brings this case within the rule of the *Lynah* case rather than that of the *Mills* case.

of the appurtenant easements of access, and this fact alone would seem to justify the taking of the fee.[11]

The so-called "excess taking" cases[12] relied on by the court below should be distinguished in the

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[11] The opposition of respondents to the taking of the fee in their properties is not based on any desire to retain their lands in the condition in which they have been left. It is clearly based on the hope that the National Park Service will accept the other lands acquired by petitioner and construct a highway to serve their properties, thus according to them a preferential treatment denied to the other landowners. The respondent Welch, the only respondent who testified, admitted as much on the stand (R. 61). Respondents Rust, Hyatt, Lollis, and Bradshaw frankly took this position in their brief filed in the District Court: "Under its agreement with the State, et al. the Department of the Interior is to reconstruct the road at some future date, perhaps not until the war is over. The landowners in this litigation are perfectly willing to bide their time, cooperate with the public authorities, and await such reasonable time as may be necessary, to relocate and reconstruct said highways". (Br., pp. 26–27.) In their brief in opposition to certiorari, respondents still take the position that the Government should afford them preferential treatment by constructing a road to serve their properties, stating that the cost of a road to serve only the four respondents who have not waived their claim for damages "will be almost negligible" (p. 23). The undisputed testimony shows that the cost of such a road would be approximately $330,000 (R. 36), not $40,000 or $50,000 as the District Court states in its Memorandum Opinion (R. 13), cited by respondents.

[12] *Cincinnati* v. *Vester*, 33 F. 2d 242 (C. C. A. 6), affirmed, 281 U. S. 439; *Warm Springs Irr. Dist.* v. *Pacific Live Stock Co.*, 270 Fed. 560 (C. C. A. 9); *Wilton* v. *St. Johns County*, 98 Fla. 26; *Richmond* v. *Carneal*, 129 Va. 388; *Salisbury Land & Imp. Co.* v. *Commonwealth*, 215 Mass. 371; *Opinion of the Justices*, 204 Mass. 607.

present instance as they were in the *Brown* case, where it was pointed out that the distinction

> * * * is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation [263 U. S. at 84].

The Tennessee Valley Authority is not here seeking to profit from the sale of the lands sought to be acquired or to recoup any part of the cost of the Fontana project.

The court below was apparently misled by the fact that the agreement of settlement contemplates the ultimate transfer of the possession and control of the lands condemned from the Tennessee Valley Authority to the Department of the Interior, stating that petitioner is seeking to condemn the lands "in order that it may convey them to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park" (R. 126). It looked at the case exactly as though petitioner were condemning lands located in another part of the State and having no possible relation to the Fontana project, in order to secure the incorporation of those lands in the national park in return for a release of the State's claim for damages for the flooding of the highway. It completely overlooked the fact that the lands themselves were directly affected by the reservoir,

that the easements of access appurtenant to them were taken, that the value of the lands was almost completely destroyed by the construction of the reservoir, and that the lands themselves were at least as important a part of the relocation problem faced by petitioner as was the highway.

Petitioner does not contend that it could condemn respondents' lands in order to turn them over to the Park Service. They are not being condemned for that purpose. If the lands had not been adjacent to the park, it would equally have been necessary for petitioner to acquire them so that they could be retired from private ownership. Having acquired the lands, the Tennessee Valley Authority would have no further need for them, and would be compelled to work out some other plan for their disposition.[13] Here, it was possible for the Authority to avoid this problem by turning the lands over to the Department of the Interior. The transfer will result in a benefit to the United States and to the State of North Carolina, since it will enable the

[13] See Presidential Proclamations approving transfer to the Forest Service, Department of Agriculture, of the possession and control of 16,780 acres acquired by the Tennessee Valley Authority in the construction of Hiwassee Dam and Reservoir (5 Fed. Reg. 4510) "in order to afford protection to the reservoir, to mitigate severance damages, and to reduce road relocation costs" (5 Fed. Reg. 4504); Presidential Proclamations approving transfer of lands in Polk County, Tennessee, and Fannin County, Georgia, from the Tennessee Valley Authority to the Forest Service, Department of Agriculture (5 Fed. Reg. 4515).

National Park Service to complete the Great Smoky Mountains National Park to its authorized boundaries and to construct the around-the-park highway contemplated in its master plan; but this benefit is purely incidental, and the condemnation would have been equally necessary if the Authority had been unable to make this disposition of the lands. The factors necessitating acquisition of the land were the difficulty of replacing the road and the impracticability of leaving the lands in private ownership without access. There is no warrant in the record for imputing any other purpose for the acquisition. Since the lands are being taken for an authorized public use, their subsequent transfer to the National Park Service is a matter as to which respondents have no standing to complain. *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States,* 317 U. S. 698; *United States* v. *Forbes,* 259 Fed. 585 (M. D. Ala.), affirmed, 268 Fed. 273 (C. C. A. 5); *United States* v. *Meyer,* 113 F. 2d 387, certiorari denied, 311 U. S. 706.

Under the facts of this case, it seems clear that the taking was for a public use, irrespective of the question of relative expense of the various alternatives available to the Government, but it is submitted that this factor alone would support the Government's action in condemning the lands of the respondents. See *Old Dominion Land Co.* v. *United States,* 296 Fed. 20 (C. C. A. 4), affirmed, 269 U. S. 55. The alternative of con-

demning the interest of the State in the highway and the rights of access of the land-owners, would probably have cost in excess of two million dollars, or approximately double the cost of the alternative adopted.[14] To prevent the Government from giving weight to considerations of economic feasibility and financial good sense would add greatly to the cost of government projects. Since the

[14] The cost of relocating the road would have been approximately $1,400,000 (R. 21, 41). Under the decided cases, this would have been the measure of petitioner's liability to the State. *Town of Bedford* v. *United States*, 23 F. 2d 453 (C. C. A. 1); *United States* v. *Wheeler Township*, 66 F. 2d 977 (C. C. A. 8); *United States* v. *Town of Nahant*, 153 Fed. 520 (C. C. A. 1); *United States* v. *Alderson*, 53 F. Supp. 528 (S. D. W. Va.); *Jefferson County* v. *Tennessee Valley Authority*, 146 F. 2d 564 (C. C. A. 6), certiorari denied, 324 U. S. 871; *Mayor & City Council of Baltimore* v. *United States*, 147 F. 2d 786 (C. C. A. 4). This liability could not be avoided by acquiring the easements of access because the road was a through highway forming a link in the state highway system, although not generally used as such (R. 15, 52). By taking the easements of access appurtenant to their lands, petitioner also incurred a liability to the individual landowners measured by the depreciation in the value of their properties resulting from the taking. *Schiefelbein* v. *United States*, 124 F. 2d 945 (C. C. A. 8); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297 (C. C. A. 8); *cf. Hiatt* v. *City of Greensboro*, 201 N. C. 515; *Davis* v. *Alexander*, 202 N. C. 130; see annotations, 49 A. L. R. 339 and 93 A. L. R. 639. The value of these properties was substantially destroyed, and petitioner's liability would therefore have been substantially the value of the fee (R. 58-61)—approximately $775,000 (R. 65). There is no merit to the suggestion of the court below that the solution adopted is uneconomical because it involves the construction by the Park Service of a more expensive road at some time in the future. The proposed road is part of the master plan

question of cost is always a vital consideration in determining whether or not to construct a project, particularly one intended to be wholly or partially self-supporting, the costs added by so narrow a view of the Government's powers of condemnation could prevent the construction of many projects which would otherwise be feasible.

III

The determination of the Authority's Board of Directors that the taking of respondents' lands was necessary for carrying out the statutory program of the Tennessee Valley was made in good faith, was not an abuse of discretion, and may not be set aside by a court

The decision of the Board of Directors of the Tennessee Valley Authority to enter into the contract of settlement with the State of North Carolina, Swain County, and the National Park Service (R. 99–113) was made after consideration of a report prepared by the Tennessee Valley Authority's staff which set forth the reasons for the proposed contract and recommended its approval (R. 14–16, 20-21, 59, 61–65).

The Board of Directors adopted identical resolutions in determining that the acquisition by the Tennessee Valley Authority of the fee in the lands of each of the respondents "is deemed by

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developed by the Park Service for the Great Smoky Mountains National Park (R. 64, 105–107) and presumably will have a value to the park at least equal to its cost. Since the lands acquired have a value to the Government as part of the park, this value should also be deducted from the total cost in weighing the over-all desirability of the settlement.

the Board to be necessary for the carrying out of the provisions and purposes of the Tennessee Valley Authority Act of 1933" (R. 61–62). The District Court found that:

> These determinations made by the Board of Directors of the Authority were made after the consideration of reports and recommendations presented to the Board by members of the Staff of the Authority, setting out the facts and circumstances surrounding the situation of the property involved, and *were made in good faith* [R. 14; 21; italics supplied].

In the face of the good-faith determinations by the Tennessee Valley Authority's Board of Directors that the taking of the fee in respondents' lands was necessary, the court below, while giving lip service to the rule that "ordinarily, the necessity of a taking for public use is a legislative and not a judicial question and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts" (R. 129), proceeded to hold that "the only land which it was necessary for the TVA to take for the statutory project was the land covered by its reservoir" and that to condemn the lands, rather than easements of access appurtenant to them, "was excess condemnation, as they were not needed for any purpose authorized by the statute" (R. 130).

In so doing, the court ignored the rule so frequently announced by this Court that the determination as to the necessity for taking property

is a legislative question, not subject to judicial review. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66–67; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700; *Joslin Co.* v. *Providence*, 262 U. S. 668; *Bragg* v. *Weaver*, 251 U. S. 57; *Sears* v. *Akron*, 246 U. S. 242; *Shoemaker* v. *United States*, 147 U. S. 282; *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668; *accord*, *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; *Barnidge* v. *United States*, 101 F. 2d 295 (C. C. A. 8); *Coggeshall* v. *United States*, 95 F. 2d 986 (C. C. A. 4); *United States* v. *Threlkeld*, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; *Atlantic Coast Line R. Co.* v. *Town of Sebring*, 12 F. 2d 679 (C. C. A. 5).

The court below attempted to distinguish these cases on the ground that there is no constitutional power to take lands not actually flooded for reservoir purposes; that the lands are not, therefore, being taken for a public use; and that the determination of the Authority's Board of Directors is nugatory. That reservoir use is a public use is conceded, and that the lands are being taken for reservoir purposes we have already demonstrated (*supra*, pp. 25–35). Since the lands are being taken for a public use authorized by statute, the decision of the court below that the fee title is not necessary is an invasion of the legislative province. The extreme nature of the decision is apparent when we consider that the flooding of Highway No. 288 substantially destroyed the value

of respondents' lands and constituted a taking of at least the easements of access appurtenant to the lands.[15] The court therefore was substituting its judgment for that of the Authority's Board of Directors, not merely as to the lands needed for the project but as to the extent of the interest needed in lands in which, concededly, some interest must be acquired. Where some interest in the property must be taken, the extent of the interest to be acquired is certainly a matter within the discretion of the administrators to whom the duty of making the necessary determinations has been delegated by Congress.

The case of *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706, is in point. There, as here, lands not flooded were taken for a reservoir, and the landowners contended that a lesser interest than the fee was all that was required for the Government's purposes. In disposing of this contention, the court ruled that the determination of the Secretary of War that the taking of the fee was necessary was not subject to judicial review, stating that:

> Determination of the extent, amount or title of property to be taken, by an Administrative Department, is, in the absence of bad faith, final. [113 F. 2d at 392.]

There is no finding in the case at bar that the determination of the Authority's Board of Directors as to the necessity for taking the fee in respondents' lands constituted an abuse of discre-

[15] See *supra*, p. 33, n. 10.

tion, and there is no conceivable basis in the record on which such a finding could have been based. As pointed out above (pp. 28–29), the acquisition of the fee in the lands served by Highway No. 288 was the only practical solution of the problem created by the flooding of the highway. Far from being abused, the discretion delegated to the Authority was exercised with care and wisdom. The District Court repeatedly commended the manner in which it was exercised:

> I think you gentlemen acted with the very finest motives and my heart is absolutely with you * * * [R. 45].
>
> I think it's a fine plan, everything you did, and I thoroughly approve of it [R. 50].
>
> I think your plan was good, and it is going to work out well if you can just get the land that belongs to these fellows here [R. 55].

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Nos. 528-533

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

S. COLUMBUS WELCH

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

JOHN BURNS, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

FRED LOLLIS, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ARNOLD E. BRADSHAW, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

PHILIP G. RUST, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ABRAHAM COLE HYATT, ET AL.

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The Opinion of the Circuit Court of Appeals (R. 201-210) is reported in 150 Fed. (2) 613. The Opinions of the District Court (R. 12-21) are not reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on July 21st, 1945 (R. 210, 212-214, 215, 216, 217 & 219). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., Section 347).

Question Presented

The question involved is whether T. V. A. is authorized by law to condemn the Respondents' lands, which, concededly, it does not need for any purpose in the construction, operation or maintenance of its Dam, but which it seeks to acquire to convey to the Department of Interior for park purposes, and thus to settle T. V. A.'s liability to the State of North Carolina, to Swain County and to these Respondents, for flooding a highway.

Statute Involved

The Tennessee Valley Authority Act of 1933, with its several amendments (48 Stat. 58, 49 Stat. 1075, 53 Stat. 1083, 54 Stat. 611, 55 Stat. 599, 575—16 U. S. C. A., Chapter 12A) is quoted in full in R. 107-159. (See Appendix hereto for quotations of those sections of the Act alleged to be pertinent here.)

Statement

Pursuant to the powers granted to it by the Act, the Tennessee Valley Authority, hereafter called "T. V. A.", acquired certain lands in the western part of North Carolina adjoining the Little Tennessee River and constructed what is now known as the Fontana Dam and Reservoir. The dam is about twenty miles westerly from Bryson City, North Carolina, near the North Carolina-Tennessee State line, and the reservoir is immediately to the east of the dam.

By the time of the hearings in these proceedings in the District Court, T. V. A. had acquired the title to all of the land needed or sought for the dam and the reservoir, and, in fact, had completed the construction of both of them (R. 7, 6).

Immediately prior to the construction of the Dam and the flooding of the reservoir, there had been located along and near what has since become the northerly boundary of the reservoir, a road, known as Highway No. 288. The road was entirely within Swain County, North Carolina, and extended from Bryson City westerly along or near the north bank of the Little Tennessee River to a point near the present site of the Fontana Dam, a distance in all of about twenty miles, as the crow flies, about forty or fifty miles by the road, 288.

Between Highway 288 on the South, and the southern boundary of the Great Smoky Mountains National Park on the North, is an area consisting of approximately 44,000 acres of land (See Map, R. 222); and when T. V. A. began the Fontana Project, about two hundred and sixteen families lived there. The lands of all of these respondents are located there (See Plats shown in orange on Map, R. 222). Highway 288 was the only practical means of access to those properties.

It appeared to T. V. A. that the reservoir would probably flood a part of Highway 288. Consequently, it sought to reach an "agreement of settlement between the Tennessee Valley Authority, the State of North Carolina, and Swain County to satisfy the liability of T. V. A. to the State of North Carolina and to the landowners whose means of access was to be destroyed by the flooding of Highway 288." For that purpose, T. V. A. entered into a contract, on July 30, 1943, with the State of North Carolina, the Department of the Interior of the United States of America, and with Swain County (R. 167-187).

None of the landowners are parties to the contract, and there is nothing in the record in any of these cases to indicate that any of them participated to the slightest extent in any of the negotiations or conferences which culminated in the contract.

The contract provided, among other things, that T. V. A. would save the State of North Carolina and its public agencies harmless from any claim which might be asserted against them for damages sustained as a result of the submerging of Highway 288; that T. V. A. would acquire, by purchase or condemnation, title to *all* of the 44,000 acres, i. e. the entire area between Highway 288 and the southern boundary line of the Great Smoky Mountains National Park, except about 2,000 acres owned by North Carolina Exploration Company; that when thus acquired, the entire area except the very small portion to be flooded by the reservoir, would be conveyed to the Department of the Interior to become a part of the Great Smoky Mountains National Park; and that the Department of the Interior would construct a modern highway through the area, from Bryson City to a point at or near the Fontana Dam, when the funds therefor should be made available by appropriation of Congress (R. 170); that T. V. A. would pay $400,000.00 to Swain County (that being the outstanding balance on certain bonds theretofore issued to raise funds for the construction of Highway 288); and that the State of North Carolina would contribute $100,000.00 to T. V. A. to aid the latter in making the payment of the $400,000.00 to the County (R. 103-105, also 167-187).

The only other pertinent facts are those which relate specifically to the lands of these respondents.

None of the lands sought to be condemned in any of the six consolidated actions have any physical connection with the Fontana Dam or its reservoir (except one and one-half

acres of the Welch lands, which were required for the reservoir but have been eliminated from this proceeding by a tender of a deed conveying them to T. V. A.) (R. 28). In fact, it is conceded by the petitioner that the purpose of condemning these lands was to acquire them for the Park and thus to extinguish T. V. A.'s liability for flooding 288.*

The respondents Welch and Burns have waived all rights to claim any damages from T. V. A., the United States of America, the State of North Carolina or its Public Works Commission, or from Swain County, "on account of any impairment, interference, or injury" to their respective properties resulting from the flooding of Highway 288. These respondents have agreed, in their respective answers herein, to file formal waivers to that effect (R. 13, 14).**

The lands of the respondents Lollis, Bradshaw, Rust and Hyatt, are located at distances varying from a half-mile to four miles from the high water mark of the reservoir (R. 37, 38).

The Rust lands (approximately 4,500 acres of the 6,000 acres, more or less, involved in this proceeding) adjoin the Great Smoky Mountains National Park (R. 37). They are located at distances varying from one-half mile to four miles from the high water mark of the reservoir (R. 37). Nolands Creek flows southerly from the Park through the Rust land and into the Little Tennessee River (See Map, R. 222). Several families reside in the Nolands Creek settlement, and travelled to and from their homes on a modern road which parallels the Creek and extends to Highway 288 (Map, R. 222).

Parts of the Rust land have been improved by private roads and modern residences. They have been piped with

* R. 39, 40—Finding of Fact 37.

** This is provided in both the Welch and Burns judgments in their respective cases. (See R. P. 1, 2, 3, 4, and 5.)

running water, and are equipped with electricity generated by the Rust power-plant. The property has been used extensively for the growing of timber.

The land of the several other respondents is used chiefly for farming.

After T. V. A. had *purchased* approximately 38,000 acres in the 44,000-acre area (i. e. practically all of the land westerly from Grey Wolf Creek and Forney's Creek to Deal's Gap) (Again see Map, R. 222), it sought to condemn the lands of these respondents, which are located almost entirely in the portion of the area lying easterly from Forney's Creek and between that point and Bryson City, a distance of from five to eight miles (R. 33 and 39).

All of the respondents moved for dismissal of the condemnation petitions, on the ground that there exists no legal basis or authority for the condemnation of their lands, since no part of any of those lands or the material thereon was, or is needed or sought for any use authorized by the Act.

After full hearings, arguments, and the filing of Briefs, the petitions for condemnation were dismissed by the District Court; and its decision was unanimously affirmed by the Fourth Circuit Court of Appeals (150 F. (2) 613, R 201 and 210).

Argument

In approaching the legal question, it is, of course, essential to look not merely at the facts with respect to the 44,000-acre tract in its entirety, but to bear in mind the particular circumstances surrounding the lands here sought to be condemned, as they prevailed when these proceedings were heard below, and, at present. We have pointed out that the titles to all of the tracts, consisting of 44,000 acres in the aggregate, except about 6,000 acres, have been acquired, and, in fact, had been, prior to the District Court hearings

in these proceedings. None of the lands here involved (except that portion of the Welch lands already eliminated from these proceedings) have any physical connection with the dam or reservoir nor will they be used in its operation or maintenance. Welch and Burns have released their claims for damages for loss of Highway 288. All of Respondents' lands except the Welch tract lie easterly from Forney's Creek, and, at a relatively very short distance from Bryson City. The purpose of acquiring the area which includes respondents' lands was to convey it to the Interior Department, for the Park, and thereby to extinguish or eliminate T. V. A.'s liability for flooding 288.[1] The importance of these facts will appear when we reach the petitioner's contention that condemnation of these properties can be justified on grounds of convenience and economy.

(A) Reply to Petitioner's Alleged Reasons for Certiorari

Petitioner has advanced four propositions as bases for its application for the Writ.

(1) The first of its contentions is that the decision of the Fourth Circuit Court of Appeals, in affirming the dismissal of the condemnation petitions in the instant case, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *U. S.* v. *Meyer*, 113 F. (2) 387, cert. denied, 311 U. S. 706.[2]

The *Meyer* case involved the Rivers and Harbor Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. § 591, which authorizes the Secretary of War to acquire by condemnation any land needed to enable him to maintain, operate or

[1] R. 39, 40—Finding of Fact 37.

[2] This reason (numbered one) is carried over into the discussion of petitioner's reason numbered two and is discussed there as well as under number one.

prosecute works for the improvement of rivers and harbors, for which provision has been made by law. The Secretary of War sought to condemn the fee to the lands of the defendants. They resisted, contending that the Secretary's action was not characterized by good faith but constituted an abuse of his discretion, for the reason that a title in fee simple was not necessary for the accomplishment of the purpose of the project. Defendants offered in evidence a letter from the Chief of Engineers of the War Department to a Senator, in which—to use the language of the Seventh Circuit Court of Appeals—"the writer indicated that in the pools of the lower reaches of the improvement, some of the lands to be acquired would no doubt be desired for development of parks and recreational facilities and stated that the land would be permanently *under water*, and that in the interest of the users of the resulting pools for navigation, recreation and police of their shores, it was considered desirable for the Federal Government to obtain more than a flowage easement and that, therefore, a fee simple title should be acquired." (Emphasis supplied.) The factual bases for the decision of the Circuit Court of Appeals in the *Meyer* case are stated in its opinion as follows (113 F. (2) at p. 392):

> "It should be observed first that the letter was incompetent as evidence, for the reason that it was not written by the official who had the burden of determining the question of necessity but by a subordinate agent with whom the Secretary may or may not have agreed. The opinions of such third persons are of no avail to impeach the integrity of the responsible official. Moreover, nothing in this document impeaches the original purpose, namely, betterment of navigation and flood control. Old Dominion Land Co. v. United States, 4 Cir., 296 F. 20, affirmed 269 U. S. 55, 46 S. Ct. 39, 70 L. Ed. 162. The evidence in the record, including that tendered by defendants, tends to disclose only a differ-

> ence in judgment as to the necessity of a fee simple title,—nothing in the way of abuse of discretion. Furthermore in their cross-complaint defendants averred that the possession of the Government 'would completely destroy' the lands 'by the operation of the dam.' If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite."

In the *Meyer* case, the Circuit Court found that no persuasive evidence had been produced to show that the lands, sought to be condemned, were actually unnecessary for the purposes of the Act, but that they would be permanently under water as a result of the operation of the dam. The Court found that no proof had been produced to show abuse of discretion by the Secretary of War. The Court stated that, in the absence of bad faith or abuse of discretion, the Secretary's determination was not subject to judicial review. Consequently, the prayers of the condemnation petition were granted.

In the case at bar, the finding on a similar factual question was exactly to the contrary of the finding in the *Meyer* case. Here, petitioner needed none of the lands of the respondents for any of the purposes expressly enumerated in the Act (R 39-40, F. of F. 37). Judge Parker, for the Circuit Court of Appeals, stated this fact thus (150 F. (2) 616, 617, Pars. numbered 4 and 5, R. 203):

> "None of the 44,400 acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a con-

> tract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway."

The petitioner contends that there has been no finding by either of the Courts below of abuse of discretion on the part of T. V. A., in this proceeding. A remark by Judge Webb made early in the proceeding in the District Court has been grasped by petitioner, in an effort to substantiate this contention (Petition, P. 9). We will not pause here to point out Judge Webb's *finding* on the point, but will revert to it hereafter. It seems sufficient at this stage to point out that each of the Courts below flatly held that, in attempting to condemn these lands, T. V. A. went far beyond its authority. Although, exceeding one's authority is perhaps a step beyond what may be strictly an abuse of discretion, the duty of the Courts is, of course, equally clear when a governmental agency attempts either.

In the instant case, the Circuit Court gave expression as follows to its full recognition of the legal principle pronounced in the *Meyer* case:

> "(4, 5) It is well settled, of course, that, ordinarily, the necessity of a taking for public use is a legislative and not a judicial question and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts. Rindge Co. v. County of Los Angeles, 262 U. S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186; Bragg v. Weaver, 251 U. S. 57, 58, 40 S. Ct. 62, 64 L. Ed. 135; Shoemaker v. United States, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170; 18 Am. Jur. 734, 737. It is equally well settled, however, that 'the nature of a use, whether public or private, is ultimately a judicial question.' Rindge Co. v. County of Los Angeles, supra, 262 U. S. at page 705, 43 S. Ct. at page 692, 67 L. Ed. 1186; City of Cincinnati v. Vester, 281 U. S. 439, 446, 50 S. Ct. 360, 74 L. Ed. 950. Consequently, where property is taken in excess of

that required for the authorized public use, the excess to be used for some other purpose, the courts have power so to declare. Cincinnati v. Vester, 6 Cir., 33 F. 2d 242, 68 A. L. R. 831, and note at page 837, affirmed 281 U. S. 439, 50 S. Ct. 360, 74 L. Ed. 950; Warm Springs Irr. Dist. v. Pacific Live Stock Co., 9 Cir., 270 F. 560; Wilton v. St. John's County, 98 Fla. 26, 123 So. 527, 65 A. L. R. 488; Richmond v. Carneal, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341, and note at page 1350; Salisbury Land & Imp. Co. v. Com., 215 Mass. 371, 102 N. E. 619, 46 L. R. A., N. S., 1196; Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A., N. S., 483."

The only "conflict" between the *Meyer* case and the instant one is in the facts.

The arguments advanced near the end of petitioner's Alleged Reason One * seem to relate more directly to its principal contention in this case (that it is authorized by the Act to condemn respondents' lands) than to the subsidiary question discussed in the first part of the Alleged Reason (that the decisions below are in conflict with the *Meyer* case). Consequently, we will reserve our reply to these arguments for the present.

(2) Petitioner's reason numbered two, for the granting of certiorari, may be summarized as follows:

(a) Its plan for the condemnation of the entire area (the 44,000 acres) will avoid the expenditure of "more than $2,000,000 *and* the leaving of 216 families isolated", without the usual facilities of modern, civilized communities.

(b) To replace Highway 288 will be much less economical and less beneficial to the public generally than is T. V. A.'s plan.

(c) T. V. A.'s plan is the only one acceptable to North Carolina and Swain County.

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* Bottom p. 11-33, Petitioner's Brief.

(d) The "intrusion" by the Courts into T. V. A.'s prerogative of determining the necessity of taking Respondents' lands is in conflict with certain other decisions, cited by Petitioner.

Although none of the contentions, (a), (b), or (c) above, seem to be reasons for granting certiorari, we will reply to each of them briefly, but with such particularity only as seems proper in a reply to an application for certiorari.

(a) Very little reflection is required to observe the fallacy in the statement (a). No record reference nor explanation is given to show how the figure of $2,000,000 was reached. But, if we assume, without conceding that a substitute road, no better than 288, would have cost that much, it is obvious that if such a road had been constructed in a timely and sensible manner, the families in the area would not have been isolated even temporarily, nor would they have been deprived of any of the facilities for living which they had theretofore possessed.

(b) A study and an analysis of the various estimates of the petitioner's witnesses concerning the expense involved, will disclose that petitioner's proposed plan, which, of course, contemplates the construction of a modern highway through this area ultimately, will actually result in no saving to the Government or the taxpayers, but, to the contrary, will cost a great deal more than the expense of constructing a substitute highway for 288 and would exceed the damages for the loss of that road (R. 47-89). This appears particularly clear when it is remembered that relatively a very short stretch of road will be required for the lands of these Respondents. (See Opinions below—R. 21, and 209-210.)

Moreover, if it were actually true that the petitioner's plan would be the more profitable or more economical one for the Government, or even it would be more beneficial

for the public generally, those considerations would not justify condemnation in excess of the actual needs for the purposes expressly authorized by the Act. The question whether a taking is for a "public use" is a judicial question (*Rindge* v. *L. A. County*, 262 U. S. 700; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Shoemaker* v. *U. S.*, 147 U. S. 282; 18 Amer. Jur. 734, 737). To take the Respondents' lands for the reason and the purpose here proposed, would constitute an "excess taking" and clearly unlawful. *Cincinnati* v. *Vester*, 33 F. (2) 242, 68 A. L. R. 831, 835,[3] aff'd. 281 U. S. 439, 446. See also Annotation in 68 A. L. R. 837; *Wilton* v. *St. Jones County*, 98 Fla. 26, 123 So. 527, 65 A. L. R. 488; *Richmond* v. *Carneal*, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341 and Annotation at 1350.

(c) The plan proposed by T. V. A. (1) enabled the County immediately to meet its bond indebtedness of $400,000.00, (2) relieved the State of North Carolina of its obligation to maintain Highway 288 or any substitute therefor, and (3) contemplated conversion of a large area into a park, expected to become an attraction to many motorists from other States, and (4) likewise contemplated the construction of a first-class road, at the expense of the Federal Government, to become a link in North Carolina's chain of highways.

Perhaps the petitioner exaggerates somewhat when it contends that the proposed plan was the "*only*" one acceptable to the State, and the County. However, in all probability, the proposed plan did appeal very strongly to

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[3] The uniform rule was stated in *Cincinnati* v. *Vester*, by C. C. A. (6) as follows:

> "In none of them has the use been found to be of a public character because of financial benefits to the condemnor or taker, as such, but it uniformly has been made to depend upon a use so dominantly and directly related to the public as to be indispensable to its welfare. That cannot be said in these cases."

both the State and the County. We know of no reason why they should not have approved of it, wholeheartedly. But, of course, that furnishes absolutely no justification whatever for the acquisition of the lands of the Respondents, since, as will be seen, it would have constituted what the Courts have characterized as an "excess taking".

(1) We come now to the only legal proposition advanced by petitioner, within its reason numbered two, viz., that the decisions below conflict with those cited in the Petition.

As a preface to that proposition, petitioner asserts that if settlement had been made with these Respondents by the payment of damages for the loss of 288, instead of following the customary method in such cases, of supplying a substitute means of access, the value of Respondents' lands would have been substantially destroyed, and the damages would have approximated the value of the fee. That result, says petitioner, is undisputed.

Perhaps the lands would have had some little value under such circumstances. The point is not worth laboring. Judge Webb's comment, made during the testimony of T. V. A.'s witness, Mehinick, is interesting and perhaps the natural one.[4]

The original method of making landowners whole in such cases was by the payment of money damages.[5] However, the Courts have grafted upon the original doctrine of compensation, "compensation by substitution,"[6] and that

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[4] "The Court: I don't think anybody but a moron would have given up his right to use the road (meaning, of course, *some* road), to start with."

[5] Nichols on Eminent Domain (2nd Ed.), Vol. 1, Section 205, p. 625; Lewis on Eminent Domain (3rd Ed.), Vol. 2, § 756.

[6] *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 F. (2) 578 (C. C. A. 8—1942); *Brown* v. *U. S.*, 263 U. S. 78; *Patapsco* v. *Western Md. R. R. Co.*, 119 Md. 673, 87 Atl. 917 (Ct. of App. of Md.—1913); *Dohany* v. *Rogers* (D. C. Mich.), 33 F. (2) 918, aff'd. 281 U. S. 362, 74 L. Ed. 904; 18 Amer. Jur. 711, ch. 80; 68 A. L. R. 442.

method of compliance with the requirement of the "Just Compensation clause" of the Fifth Amendment has, of course, been uniformly sanctioned by the Courts in recent times.[6]

Consequently, the original method (payment of money damages) is now not the only recognized method. If the authorities listed on Page 15 of the Petition are cited to support a claim that destruction of the only means of access to land justifies the taking of the land, our reply is that an examination of those authorities discloses that none of them so hold.[7]

Petitioner states that there has been no finding in this case that the determination, by its Board of Directors that condemnation of respondents' lands was necessary to carry out the purposes of the Act was made in bad faith or constituted an abuse of discretion. In reply to the Alleged Reason numbered one, we have commented somewhat on that subject;[7a] but perhaps further notice of it should be taken here, since the statement appears under Alleged Reason Two.

It is true, as alleged in the Petition,[8] that, while T. V. A. was introducing its testimony, Judge Webb seemed to look favorably upon the plan to convert the 44,000 acres into a park and to build a modern highway through it.[9] From the viewpoint of a North Carolinian—unless he owned property in the area—T. V. A.'s plan probably appealed to the Judge, at least at first blush.

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[7] *Schiefelbein* v. *United States*, 124 F. 2d 945 (C. C. A. 8); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297 (C. C. A. 8); *Hiatt* v. *City of Greensboro*, 201 N. C. 515; *Davis* v. *Alexander*, 202 N. C. 130; Annotations, 49 A. L. R. 330 and 93 A. L. R. 639.

[7a] Page 10, supra.

[8] Petition, P. 15.

[9] Footnote, p. 15 of Petition, and R. 81 and 89.

The Statute [10] expressly authorizes T. V. A. to condemn all property which it deems necessary "*for carrying out the purposes of this Act.*" T. V. A.'s Board of Directors passed a resolution declaring respondents' lands to be necessary for the purposes of the Act. Without pausing here to point out the bases (factual or legal) for the decisions of the Courts below—to which we will address ourselves hereinafter—it will suffice to say, in reply to petitioner's assertion (that no bad faith or abuse of discretion by T. V. A. was found by the Courts below), that each of those Courts found and expressly stated that none of these lands were needed for any purpose authorized by the Statute. [11] [12] Implicit in each of the decisions below is a positive finding of abuse of discretion.

We pass now to petitioner's contention proper that, in rejecting its "Board's good faith determination of necessity, the decision below is in conflict with the decisions of this Court in *Rindge Co.* v. *Los Angeles County,* 262 U. S. 700, 708-710; *Joslin Co.* v. *Providence,* 262 U. S. 668; *Bragg* v. *Weaver,* 251 U. S. 57; *Sears* v. *Akron,* 246 U. S. 242; *Shoemaker* v. *United States,* 147 U. S. 282; and *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668."

In *Rindge Co.* v. *L. A. County* (*supra*), lands were sought to be condemned for use as public highways. This Court

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[10] T. V. A. Act, Sec. 4(i), Title 16 U. S. C. A. 831 c(i) (See R. 113, and Appendix hereto, Pp. 1 and 2).

[11] R. 39-40 (F. of F. 37 and 38)—District Court's findings.

[12] The statement of the C. C. A. is as follows (R. 207):

"In the case at bar, the only land which it was necessary for the T. V. A. to take for the statutory project was the land covered by its reservoir. In taking this it flooded the highway affording access to the lands in question. This it had the right to do and to condemn the highway and any easements over it appurtenant to the lands to which it afforded access. To condemn the lands themselves, however, was excess condemnation, as they were not needed for any purpose authorized by the statute."

there stated that, "The two fundamental questions involved are whether the uses for which these lands have been taken are public uses authorized by law; and whether the taking was necessary to such uses." The facts were similar to those in the *Meyer* case, *supra*.[13] A finding that the lands of Plaintiffs in Error, in the *Rindge* case, were actually necessary *for use as a public highway* was made, not merely by Los Angeles County, but by the local, and the appellate State Courts; and this Court held that it would not disturb those findings. The determinative finding of fact in the *Rindge* case was the diametric opposite of the finding of the fundamental fact in the case at bar. Here, T. V. A. *contends* that the use proposed for respondents' lands is authorized by the T. V. A. Act. The fact is, however, as was found by the Courts below, that the Act nowhere authorizes a taking for such a purpose. It will be remembered that, if condemned, these lands are "to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park * * * as a means of extinguishing the liability of T. V. A. for flooding the highway."[14] The only conflict between the decision in the *Rindge* case and the instant one is in the facts.

The only question in *Joslin Co.* v. *Providence*, 262 U. S. 668,[15] comparable to any of the questions raised in the instant case is whether the *necessity* for taking property for *"public use"* is a legislative or a judicial question. When we come to petitioner's alleged Reason numbered Three, it will be seen that the term "public use" has uniformly been used by the Courts in a somewhat limited or technical sense and has not been accorded either a broad or a literal

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[13] See Pp. 7 hereof. discussion of *U. S.* v. *Meyer*, 113 F. (2) 387, cert. denied, 311 U. S. 706.

[14] R. 39, 40—Finding of Fact 37.

[15] Cited on p. 16 of Petitioner's Brief.

meaning. It is not used in the sense of public utility, public interest, common benefit, or general advantage or convenience, nor synonymously with the more indefinite term, "public improvement". It is used as a brief way of saying, a use authorized by the particular statute under consideration.[16] With that construction or meaning of "public use" clearly in mind, it will be readily seen that there is no conflict between this Court's decision in the *Joslin* case and the decision of the Court below in the case at bar. The principle of law on which this Court approved the taking in the *Joslin* case was expressly recognized by the Circuit Court of Appeals in its opinion in the case at bar.[17]

Bragg v. *Weaver*, 251 U. S. 57, with which petitioner also claims the decision below to be in conflict,[18] involved the taking of earth to be used in repairing a public highway. The taking was from defendant's land adjoining the highway, the nearest, the most convenient and the cheapest place to get it. The taking was authorized by a Virginia statute, i.e. was for a "public *use*". This Court affirmed the decision of the Virginia Courts, holding that the expediency of the taking was for the legislative body, and not for the Courts to decide. The Courts below in the case at bar departed not one inch from the rule followed in the *Bragg* case.

It was held in *Sears* v. *Akron*, 246 U. S. 242, 251, that the determination of the *necessity* for taking land for "*public use*" is a legislative function. There is no conflict on that question between the *Sears* case and the instant one.[19]

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[16] See *Bloodgood* v. *Mohawk & H. R. Co.*, 18 Wend. 9, 31 Am. Dec. 31. 356, and other cases cited infra in our discussion of Alleged Reason 3.

[17] See paragraph of Opinion beginning at bot. p. 206 of Record and extending just below middle of p. 207.

[18] Petitioner's Brief, p. 16.

[19] See again R. 206, 207.

Shoemaker v. *U. S.*, 147 U. S. 282, is authority for the same proposition as are *Bindge Co.* v. *L. A. County*, *Joslin Co.* v. *Providence*, *Bragg* v. *Weaver*, and *Sears* v. *Akron*, all discussed *supra*,[20] viz., that the determination, whether the use proposed to be made of private property is a "*public use*," is a judicial function; and that, if that question be decided in the affirmative, the *extent* to which such property shall be taken *for such use* is for the legislature to decide. The rule was given full recognition by the Courts below in the case *sub judice*, as we have repeatedly pointed out in our discussions above regarding the other cases cited by petitioner.[21]

In *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, cited by petitioner,[22] Acts of Congress authorized condemnation of property for a national cemetery at Gettysburg, Pennsylvania, on the site of the battlefield. The proposed condemnation was held to be for a purpose specified in the statute, i.e. for a "public use". The decision was in accordance with the rule announced in the other cases involving "necessity" and "public use" discussed hereinabove, and the rule was followed by the Court below in the present case.

Petitioner states[23] that:

> "The intrusion of the court below into the legislative task, delegated to the Authority's Board of Directors, of determining the necessity for a taking is also in conflict with the decisions in United States v. Meyer, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; Barnidge v. United States, 101 F. 2d 295 (C. C. A. 8); United States v. Threlkeld, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; and Atlantic Coast

[20] See Pp. 16-19 hereof.

[21] See Pp. 16-19 hereof, and R. 206, 207.

[22] Petitioner's Brief, p. 16.

[23] Middle p. 23, Petitioner's Brief.

Line R. Co. v. Town of Sebring, 12 F. 2d 679 (C. C. A. 5)."

We have already discussed the decisions in the first of the above cases (*U. S.* v. *Meyer*) at length.[24] No additional discussion seems necessary to show that the difference between that case and the instant one is in their opposite factual situations, and that the same principles of law were pronounced and followed in each.

In *Barnidge* v. *United States*, *supra*, while the term "public use" seemed to be used synonymously with "necessity", which was a departure from the construction of those terms in the several other cases cited by petitioner, a careful analysis of the opinion discloses that, again, the fundamental difference between that case and the one under consideration here is in the facts. In the *Barnidge* case, the Circuit Court of Appeals (8) found, as a fact, that the land sought to be condemned was to be used for a purpose actually authorized by the *Historic Sites Act*.[25] This finding was, of course, the opposite of what we have seen to have been the findings of the Courts below in the instant case. Then, there is the further difference that, in the *Barnidge* case, the Court at times used the terms "necessity" and "public use" synonymously. To that extent the opinion—not the decision—differs, not only from the decisions below in the present case, but likewise, from the several opinions of this Court cited and discussed hereinabove and other opinions of this Court and of other Courts cited *infra*.

Petitioner states that the decision in *United States* v. *Threlkeld*, 72 F. (2) 464, is another with which the decision below is in conflict.[26] The pronouncements of the general

[24] See Pp. 7-11 hereof.

[25] See 101 F.(2), pars. (10), (11), (12), and (13-15) on Pp. 295-299

[26] See Petition, p. 16.

principles of law, which we have discussed in the several paragraphs above (i.e. legislative determination of "necessity" and judicial determination of "public use") are identical in the *Threlkeld* case and in the decisions below here. There is no distinction between them worthy of comment here, or worthy even of notice for that matter.

The same is true of *Atlantic Coast Line R. Co.* v. *Town of Sebring*, 12 F.(2) 679. (See p. 681).

(3) Petitioner's Alleged Reason numbered Three seems actually to be a continuation of its Reason numbered Two, or at least of what we have called "(d)" thereof, the "in conflict" argument.[27] The only distinction appears to be that, in its Reason numbered Three, the "in conflict" argument is extended to two more cases, viz., *Brown* v. *U. S.*, 263 U. S. 78, and *Dohany* v. *Rogers*, 281 U. S. 362.

Since petitioner seems to rely chiefly upon the decisions in the *Brown* case, the *Dohany* case and the *Meyer* case and has given special attention to the *Brown* and the *Dohany* case in its Reason Three, we will now discuss those two cases.

The first of them chronologically is *Brown* v. *U. S.*, *supra*. The damming of the Snake River flooded three-fourths of the town of American Falls, Idaho. The Act of Congress there *specifically authorized the condemnation of sufficient land for a new town-site, to replace the flooded portion*, also expressly provided for the removal of the buildings to the new site, and finally, for the sale of any lots remaining in the area condemned, not used in exchange for the flooded lands. Brown opposed the condemnation, contending that, the object being to condemn his land for exchange and or sale to another, it was not for a "public use", but was unconstitutional. This Court, in affirming the decision below, pointed out that the town was an in-

[27] See (d) on p. 14, *supra*.

portant one for its section; that three-fourth of its streets, alleys and parks would have to be abandoned, as would many of the buildings (private and public) in the portion to be flooded unless they could be moved to new locations nearby, and that because of the topography of the land, they could be moved only to the gradually rising ground east of State River; that the land sought to be condemned was the only available place to which the flooded part of the town could be moved practicably so as to be united with the one-quarter remaining; and that the acquisition of the new townsite was expressly authorized by the Act and was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.

In *Dohany* v. *Rogers*, 281 U. S. 362, the Highway Commission of Michigan, in reconstructing and widening a road, adjoining for several miles a railroad right-of-way, contracted to acquire the right-of-way in exchange for certain other lands, sought to be condemned for relocation of the railroad. The appellant, whose lands were sought, brought suit to enjoin the condemnation thereof. It will be observed at once that the facts here are comparable to those in the *Brown* case, *supra*. In both the *Brown* and the *Dohany* cases, the method followed was what Chief Justice Taft, in the first of those two cases, characterized as "substituted compensation", which is exactly the procedure, we respectfully submit, that should now be followed in the instant case.

If, in the present proceeding, as occurred in *Public Power Central Nebraska Public Power Co.*, 124 F. (2) 57[illegible] A. 8—1942), and in so many other similar situations since *Brown* v. *U. S.* (See R. 61), the condemning agency were seeking to acquire lands of the respondents for a right-of-way to replace 288, we would certainly not be here objecting. Such a method would, if followed, enable T. V. A.

to meet its remaining liability to North Carolina and to Swain County, and to these landowners, for the loss of 288. It will be relatively very inexpensive, because respondents Burns and Welch have definitely waived their claim for any substitute highway or for damages; the damages suffered by the other respondents have been relatively small to date; and, finally, the cost of replacing 288 from the Nolands Creek Road to Bryson City (which will meet the needs of the remaining respondents and will fully satisfy them) will be almost negligible, comparatively speaking (R. 21, 209-210).

4. Petitioner advances as its fourth reason for the granting of the writ, a contention that it is important that Government agencies, engaged in the construction of dams and reservoirs, be permitted by the *Courts* to condemn private property for such purposes and uses as those for which these lands are sought.

Petitioner refers again here to the report of the Minority Members of the House Military Affairs Committee, made in 1935, regarding the addition of Section 31 of the Act.

It seems significant, though, of course of no moment from the standpoint of the legal principle involved, that, although T. V. A. itself has been the agency actually engaged in carrying out all of the projects of various types under this Act, it makes no specific reference whatever in its petition to a single project or occasion on which it has been deemed important to acquire areas comparable in size to that under consideration here for any such purpose or use as is here proposed. On the contrary, T. V. A. seems able only to point to an extract from the report of the Minority Members of the House Committee in 1935, wherein they refer to three situations in which they say that it has been found much cheaper to *buy up* little isolated penin-

sulas than to construct new roads along the steep mountain sides.

The report of the Majority Members of the same committee, relating to Section 31 of the Act is of interest here.[28] When the Minority Report is read in full, one is able to get a much better perspective of what even those members of the committee advocated, than from the short extract therefrom on page 13 of the Petition.[29]

Finally, it will be seen that Section 31, as ultimately enacted, contains no provision authorizing T. V. A. to condemn lands for any purposes other than, or in addition to those theretofore specified in the Act. On the contrary, after directing that, in carrying out the purposes of Congress "to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare", the Act shall be liberally construed, Section 31 then directs that "no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land"; and finally it contains this proviso: "*Provided*, That any land *purchased* by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder."* (Italics supplied.)

It will be observed that the references to the "little peninsulas" mentioned in the report of the Minority of the House Committee, and to the excess lands spoken of in the

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[28] See p. 34 of Appendix hereto.

[29] See H. R. 8632, quoted in Appendix hereto, p. 35.

* (R. 159 and APP. hereto, p. 34.

Majority report and in Section 31 itself,[30] all relate to excess lands which may have been "*purchased*". Perhaps it may be argued, from the presence of these references, that Congress thus inferentially granted to T. V. A., the power to purchase, in small quantities, some excess lands, within the limitations indicated in Section 31. Whatever may be true about that, it is obvious that neither the minority were urging, nor were the majority considering any proposal that the T. V. A. be authorized to *condemn* any such quantity of land, in addition to that actually needed for its projects, as is proposed in the case at bar. We do not believe that even our Adversaries seriously contend that the area which they contracted to buy or even the portion thereof which they now seek to condemn is "a little peninsula" such as was mentioned and was favored by the minority of the committee. Furthermore, of course, there is nothing in Section 31 which, even by inference, can be said to authorize such a disposition of excess lands as is proposed here.

Moreover, nowhere in these reports or in this section of the Act itself is there anything to indicate that Congress had the slightest intention to authorize the authority to *condemn* lands in excess of its needs for the actual construction and/or maintenance of its projects.

It is, of course, elementary that there is a vast distinction between the right or authority, on the one hand, to purchase land, and the power, on the other, to condemn it. The right to *purchase* private property from willing sellers is, of course, given by Congress in many instances where a taking against the owners' will would not be authorized by the Act, or condoned by the Courts. Attention should be called here to the fundamental rule that statutes under which authority

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[30] See Appendix hereto, pp. 34-36.

to condemn is claimed must be closely scrutinized and strictly construed, against the condemnor.[31]

The Courts have consistently held that the discretion given to Legislative bodies, in selecting property for condemnation, does not authorize condemnation of property for purposes beyond those expressly enumerated in the statute. Such a taking would be in violation of the Fifth Amendment to the Federal Constitution.[31½]

Finally, petitioner urges, as a reason for granting certiorari, that "An intelligent handling of the problems of readjustment arising out of the flooding of lands by an authorized dam can be had only if the Governmental agency which must deal with such problems is not too closely confined with respect to the particular means which may be adopted in their solution." This seems to be a plea that the Courts ignore their duty of determining whether private property, sought to be condemned by a Governmental agency, is sought for a purpose or a use for which Congress has authorized condemnation. It is of the nature of a demand that, not only determination of the *extent* or the *expediency* of the condemnation of the particular lands be left to the discretion of T. V. A., but that it be permitted to exercise the judicial function of determining the question of "*public use*". If such a power should be granted to T. V. A. and if it could be granted without contravening the Federal Constitution—which seems extremely doubt-

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[31] *State* v. *Gulledge*, 208 N. C. 207 (Supreme Court of North Carolina); *Refining Company* v. *Elevator Company*, 82 Mo. 121; *Herrey* v. *Railroad*, 174 Ill. 295; *Martin* v. *Rushton*, 42 Ala. 289; Cooley's Constitutional Limitations, 763.

[31½] *In re.* Winnisimet Company (Supreme Judicial Court of Mass.—1911), 209 Mass. 1, 95 N. E. 293, 294; *Mayo* v. *Windels* (N. Y. App. Div.—1938), 255 A. D. 22, 5 N. Y. S. (2) 690; Lewis on Eminent Domain (3rd Ed.—1909), Vol. 1, Sec. 311, and Vol. 2, Sec. 600; Cooley on Const. Lim. 8th (Ed.), Vol. 2, Ch. 15, p. 1147.

ful—then, of course, Congress, and not the Courts, should grant it.

On Page 17 of the Petition it is argued that the decision of the Court below, in rejecting T. V. A.'s decision that these lands are sought for an authorized use, results in confusion. We respectfully suggest that, on the contrary, the decision below and the opinion explaining the bases therefor, as was true of the several decisions of this Court and others discussed herein, clearly define the limit beyond which Governmental agencies may not go without exceeding their power under the Acts and or without violating Constitutional provisions. Such decisions should, we submit, serve as useful guides to such institutions as T. V. A., and are actually the only protection remaining to citizens against the whims and desires of Government agents in their enthusiasm, on occasions.

(B) Summary of Reasons for Refusing This Writ

In the course of our replies to the arguments of petitioner, we have indicated, and, in some instances, have argued the reasons for the refusal of certiorari in this case. However, perhaps it would be helpful, in conclusion, for us to summarize those reasons briefly.

They are as follows:

(1) There is no conflict between the decisions below, on the one hand, and those of this Court or of other Circuit Courts of Appeals, on the other.

(2) Petitioner concedes that respondents' lands are sought solely to be conveyed to the Department of the Interior for park purposes, as a means of satisfying T. V. A.'s liability for the flooding of Highway 288.

(3) The purposes for which T. V. A. was created, so far as its relation to the Tennessee River Basin is concerned, is stated in the Act to be the improvement of

navigation and flood control.[32] T. V. A. is authorized by the Act to condemn all property that it shall deem necessary for *carrying out the purposes of the Act.*[33] The lands in question are not sought for any of the purposes enumerated in the Act.

(4) The determination by T. V. A. that the use for which these lands are sought is authorized by the Act is subject to judicial review.

(5) From the standpoint of common-sense, and in the light of the decisions in the decided cases most comparable to this one, the proposed use is *not a "public use"*.[34] The fact that, if condemned, the lands will ultimately be used "for a purpose for which there could have been an appropriate condemnation" does not justify the proposed taking.[35]

(6) Even if practical considerations indicated the advisability of the proposed taking, it is still prohibited here because of lack of statutory authority, and by Constitutional limitations. Moreover, neither economy nor convenience dictates T. V. A.'s proposals, insofar, at least, as respondents' lands are concerned.[36]

(7) Finally, if the condemnation of the land in question for the Park would be in the public interest, it can be accomplished by lawful means.[37]

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[32] R. 108, Appendix hereto, p. 30.

[33] R. 113, Appendix hereto, p. 33.

[34] *Richmond* v. *Carneal*, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341 and note at 1350; *Salisbury Land & Imp. Co.* v. *Com.*, 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196; Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483; 18 Amer. Jur. 736, 737.

[35] *Cincinnati* v. *Vester*, 281 U. S. 439, 448, aff'g. 33 F. (2) 242, 68 A. L. R. 831, and note at 837.

[36] See R. 21, 209-210.

[37] R. 20-21, and 210, citing *Yarborough* v. *N. C. Park Comm.*, 196 N. C. 284, 145 S. E. 563, 569; the Weeks Law; *Hanson Lumber Co.* v. *U. S.*, 261 U. S. 581, 587; *U. S.* v. *So. P. Co.* (C. C. A. 4), 31 F. (2) 852, 856.

Conclusion

Because the Petition contains no sound reason for the granting of the Writs of Certiorari, and further because several affirmative reasons for refusing them are apparent, the petitioner's application should be denied.

Respectfully submitted,

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APPENDIX

The following include the sections of the T. V. A. Act which both sides agree to be pertinent in this proceeding, and those alleged by either the Petitioner or the Respondents to be pertinent:

Opening Sentence of Act (Title 16 U. S. C. A., Sec. 831)—

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the 'Tennessee Valley Authority' (hereinafter referred to as the 'Corporation')."

Powers of T. V. A.

Section 4(h) (Title 16, 831c(b)):

"(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act."

Section 4(i) (Title 16, 831 c(i)):

"(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation

projects at any point along the Tennessee River, or any of its tributaries, and in the event "that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings (48 Stat. 60-61): PROVIDED, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code. (49 Stat. 1075.)"

Section 4(k) (Title 16, 831 c(k) (a-d):

"(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: PROVIDED, That no transfer authorized herein in (b) shall be made without the approval of Congress; AND PROVIDED FURTHER, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or

otherwise, to the Ingall Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama:

"(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: PROVIDED, HOWEVER, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: AND PROVIDED FURTHER, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservior now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President."

Section 4(l) (Title 16, 831c(l)):

"(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the

construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end. (49 Stat. 1080.)"

Section 18 (Title 16, 831q):

"Sec. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam transmission line, and power house shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River."

Section 25 (Title 16, 831x):

"Sec. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation

of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America. * * *"

Section 31 (Title 16, 831dd):

"Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: PROVIDED, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act."

Report of Majority of House of Representatives Committee on Military Affairs, Re. Section 31 of Act:

"The vital and controversial part of this section will be found in the latter part thereof stipulating that no real estate shall be acquired or held by the Authority except what is necessary to carry out its plans and projects actually decided upon requiring the use of such real estate. There is a proviso also that any land that has been purchased by the Authority

and whose ownership is not necessary to carry out the plans and projects of the Authority actually decided upon, then that such land shall be sold by the Authority as the agent of the United States, after due advertisement, at public auction to the highest bidder. It is manifest that the Authority should not go into the real-estate business. The buying and selling of real estate not actually necessary for carrying out actual plans of navigation and flood control would have no proper logical or legal relation to regulating interstate commerce.

Therefore, section 11 should and will be construed in connection with section 3 of this bill. Any lands that the Authority has and does not need for such actual development should be sold, and all property of the United States should be sold, only after "due advertisement at public auction to the highest bidder for cash. The Government cannot afford to play favorites among any of its citizens. The buying and selling of land not necessary for developing navigation, and having no proper logical and legal connection therewith cannot be constitutionally authorized nor constitutionally exercised. Any lands actually needed can be acquired by eminent domain."

Supplemental Views of Mr. Kvale and Mr. Maverick on H. R. 8632 (Minority Report):

"The actual provisions of this section, as reported by your committee, prohibit the purchase of any land not 'actually necessary to carry out plans and projects actually decided upon requiring the use of such lands.' It also requires the Authority to sell immediately any land which it has already acquired and which it does not need for carrying out plans 'actually decided upon'.

In the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line. A program of soil protection and forestation essential to the protection of the reservoirs is being developed for these lands, but cannot wisely be adopted until further work has

been done on it. These lands were not purchased haphazardly. It was efficient and economical to acquire them at the same time that the Corporation's other land acquisition was accomplished.

For example, in some sections in the reservoir areas, little peninsulas of land are necessarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the lands in peninsulas than to construct new roads along the steep mountain sides.

To require the immediate sale of such lands, pending completion of final plans for their use, would constitute a great waste and great financial loss to the United States; and to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 528

UNITED STATES OF AMERICA, EX REL.
TENNESSEE VALLEY AUTHORITY,
Petitioner,

vs.

S. COLUMBUS WELCH

BRIEF FOR RESPONDENT

McKINLEY EDWARDS,
Counsel for Respondent.

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Circuit Court of Appeals, consolidated cases (R. 201-210), is reported in 150 Fed. (2) 613. The opinions of the District Court (R. 12-21) are not reported. The opinion of the District Court appears in the Record at page 12.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on July 21, 1945 (R. 210-211, 212-214, 215, 216, 217, 218 and 219), the judgment in this respondent's case (R. 210). The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A., Section 347).

Question Presented

Can the petitioner take the entire tract of this respondent's land consisting of 163 acres when the judgment of the District Court, from which petitioner prosecutes an appeal, requires respondent to execute a general warranty deed, without compensation, conveying to petitioner all that portion of said tract of land lying below the level of the reservoir including all lands to be submerged by the impounded waters of the Fontana Dam, and when said judgment also requires respondent to execute a deed of release, releasing all claims for damage to any of his said lands caused by the construction and operation of the Fontana Dam and reservoir, and also releasing the Petitioner, the State of North Carolina, and all its political subdivisions, of and from all obligations, liabilities, claims and damages of every nature, whether now or hereafter existing, on account of the loss, destruction and impairment of a means of access or access facilities, forever releasing the State of North Carolina, and any of its political subdivisions from furnishing or providing any roads or means of access to any of said lands. Said judgment of the District Court requiring the execution of said deed and release deed having been made and entered agreeably to the answer filed by respondent in this cause and the testimony of said respondent upon the hearing in the District Court.

Statute Involved

The Tennessee Valley Authority Act of 1933, with its several amendments (48 Stat. 58, 49 Stat. 1075, 53 Stat. 1083, 54 Stat. 611, 55 Stat. 575, 599—16 U. S. C. A., Chapter 12A) is quoted in full in R. 107-159.

Statement

The petition of petitioner filed in the District Court seeks to condemn a tract of land owned by respondent and designated in said petition as tract FR-1092 containing 163 acres, more or less. The petitioner also asks in said petition to condemn an undivided one-half interest owned by respondent in tract No. FR-141 (T. R. Vol. 1, p. 1, par. VII of the petition).

The answer of respondent filed in the District Court (T. R. Vol. 1, p. 97) does not resist the taking by petitioner of respondent's interest in tract No. FR-141, but does resist the taking by petitioner of tract FR-1092, except that portion of said tract submerged by the impounded water of the Fontana Dam (which is less than two acres of said tract), and as to this part of said tract, respondent, in his answer, offers to execute to petitioner a general warranty deed, without compensation, and also agrees to execute a release deed releasing petitioner, the State of North Carolina and all its political subdivisions from all claims for damage that may occur to said tract of land on account of the construction and operation of the Fontana Dam, also agreeing to release petitioner, the State of North Carolina and all its political subdivisions, of, and from any and all claims now, or in the future, by reason of the loss of access or road facilities of any kind to said land.

The judgment of the District Court requires the execution by respondent of said deed to the petitioner and also the execution of said release deed.[1]

The District Court found that the land owned by the respondent, S. Columbus Welch, referred to in the petition and answer as tract No. FR-1092, except that part of same lying below the level of said reservoir, bears no physical

[1] See judgment of the District Court (R. 1-3).

relation to the Fontana Project, and is not necessary for the construction, operation or maintenance of the Fontana Dam, or anything connected with the Fontana Project. The construction of a road or means of access to said tract of land is not required, and the furnishing of any means of access thereto is eliminated. That no part of said tract No. FR-1092 is taken by petitioner for public use, other than the acre and a half, or such portion as lies below the level of the reservoir, which said acre and a half, or said portion, respondent will convey to the United States of America.[2]

In the handling of the problems with which the petitioner was confronted, in connection with the Fontana Project, and in dealing with landowners owning land within the reservoir area and adjacent thereto, the petitioner accepted from North Carolina Exporation Company, a large landowner, a deed conveying to the United States of America, flowage easement rights in and over a portion of land containing 389 acres, more or less, said deed also released, acquitted and discharged the Tennessee Valley Authority, its successors and assigns and its agents and employees, and the United States of America, of and from all obligations, liabilities, claims and demands of every nature, character, and description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience, or injury resulting to the property described in said deed, or to any other property owned by the grantor in the Fontana Reservoir area, including the loss, destruction and impairment of all means of access and access facilities of every description, which extended to, included and relieved from any responsibility in connection therewith, the State of North Carolina, and Swain County, North Carolina. Over 300 acres of the North Caro-

[2] (R. 19—Finding of Fact 35 and 36.)

lina Exploration Company land, according to recitals in said deed, lying below elevation 1,715.63.[3]

In the contract between Tennessee Valley Authority, the State of North Carolina, Swain County and the United States Department of the Interior dated 30th day of July, 1943, the lands of North Carolina Exploration Company, designated therein as approximately 1920 acres, more or less, are excepted and excluded from the area and boundary described in said contract, which area and boundary included all lands, lying in Swain County, North Carolina, on the North side of the Little Tennessee and Tuckaseegee Rivers, and South of the Great Smoky Mountains National Park, extending from Twenty Mile Ridge on the West side to the divide between Lands Creek and Peachtree Creek on the East, the East boundary of the area being approximately two miles west of Bryson City, North Carolina.[4]

The lands of this respondent, which petitioner seeks to condemn, are located within the same area as the lands of North Carolina Exploration Company with reference to the large boundary mentioned in the contract between Tennessee Valley Authority, State of North Carolina, Swain County, and the United States Department of the Interior.[5]

The release deed which respondent offers to execute and which the judgment of the District Court requires respondent to execute (R. 1-3), is to certain provisions, stipulations, and recitals identical with reference to a release of easement rights in roads and highways as that contained in the deed accepted by petitioner from North Carolina Exploration Company. The land of respondent to be sub-

[3] See (R. 113-123), contract between North Carolina Exploration Company and the United States of America dated 12th day of May, 1944.

[4] See agreement between Tennessee Valley Authority, State of North Carolina, Swain County, and the United States Department of the Interior (R. 99-113).

[5] See petitioner's exhibits 3 and 4 (R. maps attached to Record).

merged by the impounded water of the Fontana Dam is to be conveyed in fee to petitioner.

Summary of Argument

I

Whether the purpose of a taking is a public one is ultimately a judicial question.

II

The uses for which petitioner seeks to take the land of this respondent are not public uses authorized by law.

III

The taking by petitioner of this respondent's entire tract of land would deny him the equal protection of the laws

ARGUMENT

I

Whether the purpose of a taking is a public one is ultimately a judicial question.

It is not for Congress, or its delegated agency, to say what is a public use or how far the power of eminent domain may go, but it is for the Courts to say under the constitutional limitation of the Fifth Amendment to the Federal Constitution.

Hairston v. *Danville & W. R. Co.*, 208 U. S. 598, 606, 52 L. Ed. 637, 640; *Sears* v. *Akron*, 246 U. S. 242, 251, 62 L. Ed. 688; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 705, 67 L. Ed. 1186, 1191, 43 Sup. Ct. Rep. 689; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66, 70 L. Ed. 162, 165; *Cincinnati* v. *Vester*, 33 F. (2) 242, 68 A. L. R. 831, 835, aff'd 281 U. S. 439, 446; see also annotation in 68 A. L. R.

In *Hairston* v. *Danville and W. R. C.*, *supra*, this Court said:

> But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question.

The case of *U. S.* v. *Meyer*, 113 F. (2) 387, cert. denied, 311 U. S. 706, is one of the cases cited and relied on in petitioner's brief. This case involved the Rivers and Harbors Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. Sec. 591, which authorizes the Secretary of War to acquire by condemnation any land needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law. In this (*Meyer*) case the defendants resisted the taking of the fee to the lands, contending that the fee was not sought in good faith and not necessary for the accomplishment of the project, also contending that a flowage easement was sufficient. The question decided in the *Meyer* case is that where the Secretary of War was authorized to take private property for a public use that the question of necessity of taking the fee simple title, or the question of taking only a flowage easement was for the Secretary of War to decide. The opinion of the Court in the *Meyer* case is not in conflict with the position taken by this respondent in the instant case. Here this respondent denies that any part of his land or any interest therein, either the fee or an easement is taken for public use, other than that part of same which the judgment of the District Court requires to be conveyed to the petitioner, together with a release

deed to petitioner and the State of North Carolina and all its political subdivisions.

In the case of *Cincinnati* v. *Vester* (*supra*), this Court considered a resolution passed by the City Council of Cincinnati directing the taking of a strip of land in addition to the land taken for a public street and this Court held that notwithstanding said resolution passed pursuant to legislative authority the portion of land not required for the public street was not a taking for public use, and denied the right of the City of Cincinnati to take the same against the will of the owner, the Court saying:

> Under the provision of the Constitution of Ohio for excess condemnation when a city acquired property for public use, it would seem to be clear that a mere statement by the Council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provisions as giving such a sweeping authority to municipalities as to make nugatory the expressed condition upon which the authority is granted. * * * It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. Under the guise of an excess condemnation pursuant to the authority of the constitutional provisions of Ohio, private property could not be taken for some independent and undisclosed public use.

The wording of the resolution passed by the City Council of the City of Cincinnati in the *Vester* case, *supra*, is similar to the wording of the resolution of the Board of Directors of the Tennessee Valley Authority in the instant case. The opinion of the Court in the *Vester* case, *supra*, points out that private property cannot be taken against

the will of the owner simply by a resolution passed by a legislative agency. Regardless of the resolution, or the good faith in the passing of the resolution, the Courts can review and say whether the purpose of the taking is a taking for public use.

Petitioner argues in its brief that the decision below is conflicting with the decisions of this Court in *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 708, 710; *Joslin Co. v. Providence*, 262 U. S. 668; *Bragg v. Weaver*, 251 U. S. 57; *Sears v. Akron*, 246 U. S. 242; *Shoemaker v. United States*, 147 U. S. 282; and *United States v. Gettysburg Electric Ry.*, 160 U. S. 668.

In the *Rindge Co. v. L. A. County* case, *supra*, lands were sought to be condemned for use as public highways. This Court held the fundamental questions involved were, whether the uses for which these lands have been taken are public uses authorized by law; and whether the taking was necessary to such uses.

A finding that the lands of Plaintiffs in Error, in the *Rindge* case were actually necessary for use as a public highway made, by the local and appellate State courts; and this Court held that it would not disturb those findings. In the instant case the District Court found that the lands of this respondent, other than the 1.6 acres, or whatever portion below the level of the reservoir, bear no physical relation to the Fontana Project, and that no part of said tract FR-1092 is taken by petitioner for "public use", other than the acre and a half or such portion as lies below the level of said reservoir (R. 19).

Bragg v. Weaver, 251 U. S. 57, involved the taking of earth to be used in repairing a public highway. The taking was authorized by a Virginia statute for a "public use". The difference in the *Weaver* case, *supra*, and the instant case is that none of this respondent's land sought to be taken, other than the part to be flooded (about which there

is no controversy), is to be used for any purpose in connection with the Fontana Project.

Sears v. *Akron, supra*, holds that the determination of the necessity for taking land for "public use" is a legislative function. This Court saying:

> It is well settled that while the question whether the purpose of a taking is a public one is judicial, the necessity and the proper extent of a taking is a legislative question.

It appears that there is a distinction in making a determination of the necessity or the extent of the taking of a parcel of land for "public use" and in making a decision of what is taken for the purpose of a public use.

In *Shoemaker* v. *U. S.*, 147 U. S. 282, it is held that the determination, whether the use proposed to be made of private property is a "public use" is a judicial function; and that if the question be decided in the affirmative the extent to which such property shall be taken for such use is for the legislature to decide.

II

The uses for which petitioner seeks to take the land of this respondent are not public uses authorized by law.

At pp. 37, 38 of the brief of petitioner it is said:

> Petitioner does not contend that it could condemn respondent's lands in order to turn them over to the Park Service. They are not being condemned for that purpose. If the lands had not been adjacent to the Park, it would equally have been necessary for petitioner to acquire them so that they could be retired from private ownership. * * * The factors necessitating acquisition of the land were the difficulty of replacing the road and the impracticability of leaving the lands in private ownership without access. * * *

From this statement in petitioner's brief it would seem that one of the main purposes for seeking to take the lands of respondent is on account of highway 288 being destroyed by the impounded water of the Fontana Dam, thus taking away the right of access to said lands.

A complete answer made by this respondent to this question, is that, he releases all rights and claims for any loss of roads or access facilities to any of his said lands, and that the judgment of the District Court requires that he execute a release deed, releasing, acquitting, and discharging Tennessee Valley Authority, its successors and assigns, and its agents and employees; the United States of America; the State of North Carolina; the State Highway & Public Works Commission of North Carolina; and Swain County, North Carolina; of and from all obligations, liabilities, claims and damages of every nature, character or description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience or injury resulting to the lands owned by respondent and designated in the petition as tract No. FR-1092, as fully described by metes and bounds in said petition, and to any other lands owned by respondent within the reservoir area of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from, or to be in any way connected with the construction of said Fontana Dam or the creation or operation of Fontana reservoir, including but not limited to:

(a) The loss, destruction and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the said State of North Carolina and all its political subdivisions;

(b) Loss, damage, impairment, interference or injury to the property described in the petition, forever releasing the State of North Carolina and any of its political subdivisions from furnishing or providing any roads or means of access whatever to any of said lands owned by respondent described and set out in the petition filed herein (R. 2, 3).

State Highway 288 does not run through the lands of this respondent. Petitioner's exhibit No. 3 shows the lands in question, the reservoir pool, also the location of highway 288, shown in red (R. 30, 31).

A landowner can release his easement in a highway.

Hiatt v. *Greensboro*, 201 N. C. 515, 522;
9 R. C. L. p. 810.

At page 38 of petitioner's brief it is suggested that the expense factor alone would support the government's action in condemning the lands of the respondents, citing *Old Dominion Land Company* v. *United States*, 269 U. S. 55.

Mr. Justice Holmes, in writing the opinion for the Court in the *Old Dominion Land Company* case, said:

> But it is said that the taking was not for a public use, because it is said that the Secretary of War at least was thinking not of a future use of the land by the public or the Government but of saving the country from the loss of the buildings. We shall not inquire whether this purpose was or was not so reasonably incidental to the necessarily hurried transactions during the war as to warrant the taking, upon the principle ill ustrated by Brown v. U. S. 263 U. S. 78. • • • but the military purposes mentioned at least may have been entertained and they clearly were for a public use.

However, if the opinion of the Court in the *Old Dominion* case is authority for the taking of private property in order

to lessen Government expenditure, such authority does not militate against the position taken in the case at bar by this respondent, for the reason that this respondent, in conformity with his answer and testimony in the District Court and also in conformity with the judgment of the District Court in his case, makes a conveyance to the United States of America, without compensation for that part of his land below the level of the reservoir and releases all rights or claims to any easement in State Highway 288 or any road facilities whatever. This is a saving to the petitioner, instead of an expense.

When this respondent agreed to make no claim against petitioner, the State of North Carolina or the County of Swain on account of the taking of Highway 288 or any access road leading to his property, he relieved the petitioner, the State and County of any and all reasons for the taking of said property, and said land then is as far removed from any connection with the Fontana Project as if it was located in a state other than either North Carolina or Tennessee, legally speaking.

When Highway 288 or any access road leading to the property of S. Columbus Welch is eliminated, then, there is no sound legal reason that can be suggested for petitioner to acquire said property. If no sound reason exists, then the taking is not for public use. It is here reiterated that this respondent, by his answer and testimony, has completely and forever removed his tract of land in question in the case at bar from Highway 288 or any other road, and by the deed and release instrument he binds himself to execute, and which the judgment of the District Court requires to be executed, forever releases the petitioner, State of North Carolina and County of Swain from furnishing road access to said tract of land.

Petitioner relies to some extent on the case of *Brown* v. *United States*, 263 U. S. 78. The opinion of this Court in the

Brown case is in no way in conflict with the position taken by this respondent. In the *Brown* case Congress specifically authorized the taking of suitable land for a new townsite to replace the portion of the town of American Falls which would be flooded by the reservoir of the Minidoka project. The land was there taken to replace a town and streets which would be flooded. In the case at bar petitioner is not taking any land or property from the United States Department of the Interior, and, therefore, is under no obligation to replace or provide any lands for said Department of the Interior to be used for a National Park. The petitioner does not seek to take any land from this respondent to replace State Highway 288 or any other road. The attempted taking of this respondent's land with the admitted purpose of later transferring same to the United States Department of the Interior shows that said land is not required for any use whatever in connection with the Fontana Project, and, therefore, is not an authorized taking for public use.

> It is generally the province of the Court to determine the preliminary questions of the right to condemn, whether the use is a public one, and the necessity of taking * * * (20 C. J. p. 974, Section 381).
>
> The burden of proof rests upon the one having the affirmative of the issue. * * * thus the burden is on the petitioner to show all facts necessary to its right to condemn, and to prove all averments made by it in the petition which have been brought into issue (20 C. J. p. 976, Section 382).

The well considered decisions of the courts, both State and Federal, hold that the burden of the issue never shifts, but always remains with the one who holds the affirmative. *Prima facie* or presumptive evidence does not, of itself,

establish the fact or facts upon which the decision of the court or verdict of the jury must rest.

Sweeney v. *Erving*, 228 U. S. 233, 57 L. Ed. 815;
State v. *Wilkerson*, 164 N. C. 432.

Another case sustaining the position taken by this respondent and comparable is *Richmond* v. *Carbical*, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341 and note at 1350.

III

The taking by petitioner of this respondent's entire tract of land would deny him the equal protection of the laws.

The argument advanced here is with reference to the contract made by the petitioner with North Carolina Exploration Company (R. 113-123), whereby petitioner accepted from said Exploration Company a deed for flowage easement and release of and from the taking of roads and road access facilities, and, thereby, permits a boundary of land containing approximately 1920 acres, more or less, to remain in private ownership. The North Carolina Exploration Company lands bear the same relation to the Fontana Project as do the lands of this respondent. By comparison of the wording and language of said instrument executed by North Carolina Exploration Company and accepted by petitioner, with the wording and language used in the answer of this respondent filed in the District Court, and also contained in the judgment of the District Court, with reference to releasing all claims for damages on account of the construction and operation of the Fontana Dam, and in connection with the loss of roads and access facilities, we find almost identical words and language, certainyl the same legal construction.

In the case of *Connoly* v. *Union Sewer Pipe Co.*, 184 U. S. 541, 559, 46 L. Ed. 679, 689; the Court said:

> No rule can be formulated that will cover every case. But upon this general question we have said that guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

In the case of *Yick Wo* v. *Hopkins* decided by the Supreme Court of the United States and reported in 118 U. S. 356 (118 L. Ed. 220), we find the following apt statement of the law:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

It would seem that the guaranty of "equal protection of the laws" would require a government agency, in the conduct of its affairs, to treat all citizens and all landowners alike with reference their civil and property rights.

It is stated in petitioner's brief, p. 35, note:

> The opposition of respondents to the taking of the fee in their properties is not based on any desire to retain their lands in the condition in which they have been left. It is clearly based on the hope that the National Park Service will accept the other lands acquired by petitioner and construct a highway to serve their properties, thus according to them a preferential treatment denied to the other landowners.

This respondent is asking for no preferential treatment, but to the contrary that he have the same privilege that peti-

tioner has already granted North Carolina Exploration Company.

A witness for petitioner, F. W. Webster, testified (R. 97), that one method of the Tennessee Valley Authority in dealing with landowners was to accept releases about a road or an access road to their property.

The judgment of the District Court, in this respondent's case (R. 1-3), from which petitioner prosecutes an appeal, requires this respondent to execute:

> (a) deed, with full covenants of warranty, conveying all of the lands contained in the description of said tract No. FR-1092 located and lying below said reservoir. The description in said deed shall cover all the land owned by the respondent which is to be submerged by water impounded by the Fontana Dam.
>
> (b) deed of release, releasing, acquitting, and discharging Tennessee Valley Authority, its successors and assigns, and its agents and employees; the United States of America; the State of North Carolina; the State Highway and Public Works Commission of North Carolina; and Swain County, North Carolina; of and from all obligations, liabilities, claims, and damages of every, nature, character, or description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience or injury resulting to the lands owned by respondent and designated in the petition as tract No. FR-1092, as fully described by metes and bounds in said petition, and to any other lands owned by respondent within the reservoir area of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from, or to be in any way connected with the construction of said Fontana Dam or the creation

or operation of Fontana Reservoir, including but not limited to:

(a) The loss, destruction, and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the said State of North Carolina, and all its political subdivisions;

(b) Loss, damage, impairment, interference, or injury to the property described in the petition, forever releasing the State of North Carolina and any of its *political* subdivisions from furnishing or providing any roads or means of access whatever to any of said lands owned by respondent described and set out in the petition filed herein.

It is ordered, adjudged, and decreed that S. Columbus Welch, respondent, his heirs, assigns, executors, or administrators, upon notice or demand forthwith execute and deliver unto the State of North Carolina and/or the United States Department of the Interior a deed for a right of way over any of the lands of respondent referred to as tract No. FR-1092, for the construction and maintenance of a road or highway through and over any of said lands, said right of way to be and include such width as the said State of North Carolina, and/or United States Department of the Interior is acquiring and using through and over adjacent lands for said road purposes, with the right on the part of the State and/or United States Department of the Interior to restrict the use of said road or highway for commercial traffic; and said land of respondent, S. Columbus Welch, is burdened with the future possibility of said easement.

It is submitted that the position of this respondent in no way interferes with the contract petitioner made with the State of North Carolina and the County of Swain, since it appears that the reason of said contract was to eliminate

any responsibility in connection with State Highway 288, and possibly any other road leading to respondent's land. This statement, however, does not concede that this respondent is in any way bound by a contract to which he is not a party.

In the contract referred to in the preceding statement, the following provision is made:

> The Authority shall not be responsible and shall incur no liability under this section for any delay or delays in the acquisition of title to any of said land caused by or attributable to title searches or other studies, condemnation proceedings or other litigation, or caused by or attributable to any act or circumstance which is incident to or reasonably related to such acquisition or which is beyond the Authority's control, it being the intention of the parties that the Authority shall incur no liability for any delays in the acquisition of any land under this section resulting from any cause whatsoever other than the willful failure or refusal of the Authority to take any step necessary to effect such acquisition.[6]

There is some suggestion in petitioner's brief about taking the lands in question out of private ownership on account of relieving the State and County of furnishing police protection. It is submitted that the Tennessee Valley Authority Act of 1933, as amended, does not confer upon the Tennessee Valley Authority the authority to take over the police powers of the country. It is further suggested that it would be no more difficult to police the 163-acre tract of this respondent's land, than to police the large boundary of the North Carolina Exploration Company land.

---

[6] See agreement dated 30th day of July, 1943, between Tennessee Valley Authority, State of North Carolina, Swain County, and United States Department of the Interior (R. 99-113, at top of page 104).

Conclusion

For the reasons given, the decisions of the court below in this respondent's case should be affirmed.

Respectfully submitted,

McKinley Edwards,
Attorney for Appellee.
S. Columbus Welch.

APPENDIX TO BRIEF FOR RESPONDENT, S. COLUMBUS WELCH

TESTIMONY BEFORE THE DISTRICT COURT

Robert E. Frierson, for Petitioner.

On cross-examination.

Q. Mr. Frierson, I believe you just have a map there before you now that has been offered in evidence and handed up to the Court that shows tract FR-1092?

A. Yes, sir.

Q. You have that map with you do you?

A. Yes, sir.

Q. Now, Mr. Frierson, the impounded waters on the Fontana Dam only cover about a tenth of an acre of that land, a little down at the lower tip, isn't it?

A. About an acre and a half.

Q. You mean you flood an acre and a half?

A. An acre and six-tenths to be exact, the way we figure it.

Q. You measured that?

A. Yes, sir.

Q. And that's the part that the respondent agrees to make a deed to the government for. You understand that, don't you?

A. I understand you to say so, sir. (Tr., 54-55)[7]

* * * * * * *

Q. Now, they don't intend to keep that land. The T. V. A. doesn't intend to keep that boundary of land or to use that boundary of land in connection with the Fontana Dam, does it?

A. No; they don't intend to keep it.

Q. Now, they are going to let somebody else have it. That's true, isn't it?

A. That's correct. (Tr., 61).

* * * * * * *

[7] "Tr." refers to the paging of the transcript in Volume II of the record.

By the Court:

Q. Was that the understanding between the T. V. A. and the Park Service, that you should condemn or buy this land and then transfer it to the Park, Mr. Frierson? Was that the understanding?

A. Yes, sir. (Tr., 63).

Frank W. Webster, for Petitioner.

On cross-examination.

Q. Mr. Webster, you stated that in your experience with the T. V. A. in acquiring lands for roads, that one method they had was taking releases on property. Now, you do know that the T. V. A. has accepted releases *from* land owners about a road or an access road to their property?

A. Yes, sir.

Q. And they consider that good—Now as a matter of fact, it has been introduced, Your Honor, in evidence, this contract—I will ask you, are you acquainted with this contract that you told His Honor about between the Government and the T. V. A. and the Interior Department?

A. Yes.

Q. You have read it?

A. Yes, sir.

Q. Well, now Mr. Webster, you know that in the contract there is excepted a boundary of land of about 1,000 acres within this area that you are talking about, within the 44,000 acres——

The Court: 44,000 acres.

Within the 44,000 acres, that the T. V. A. is not required to get and turn over to the Park.

A. Yes, sir.

Q. Now, that is the land of the North Carolina Exploration Company?

A. Yes, sir. (Tr., 103-104).

S. Columbus Welch, Respondent.

On direct examination.

Q. Now, Mr. Welch, in the pleadings that I have filed for you as your attorney in this Court, which you are acquainted with, it is stated that you will release the state, county and government from any and all damage on account of closing a road or a way to get to your property.

A. That's right.

Q. You are willing to that?

A. Yes, sir.

Q. You will do that. It is further stated in the pleadings that about an acre or a quarter of an acre of Tract 1062 that is flooded by water, that you will make a deed——

A. Yes, sir.

Q. To the United States Government, free.

A. *Free.*

Q. Deed them every bit of it. That in addition, you will execute any kind of a deed or instrument or authorize the Court in a judgment to release and relieve the United States Government, Tennessee Valley Authority, the State of North Carolina and the County of Swain, from any and all damage by reason of flooding a road or your access to this property?

A. Yes, sir.

Q. You further agree, Mr. Welch, by an amendment to your answer that I filed by permission of Court today, to give and grant to the Department of the Interior, United States Department of the Interior, the United States Government, or the state, a right of way to build a road over this tract of land containing 163 acres?

A. Yes, sir.

Q. You will convey them that, you will agree that it be put in the judgment, you will do it free and without any charge?

A. Yes, sir. (Tr., 184-186).

Cross-examination.

Q. Mr. Welch, do you understand that if you keep this property and the reservoir comes up, that you will have no way of getting to it or out of it by road at all? Do you understand that?

A. Yes; I understand that there won't be no road through it.

Q. And do you also understand that you have no way of getting a road built to that property in the future?

A. No; I don't know of any.

Q. Well, are you relying upon some assumption that you are going to get a road built to that property if you keep it?

A. Well, I can get into it, I think.

Q. Well, now, just how?

A. Well, I can get into it on the water.

Q. Do you know anything about the drawdown in that lake, that is, difference in the water level in that lake in different seasons of the year?

A. I don't——

Q. Has anybody explained that to you?

A. Well, it would be lower sometimes than others.

Q. Well, when the lake is way down low, how are you going to get, even by water, back and forth from your property to the lake wtihout going on land that you don't own.

(No answer from the witness.)

Q. You'd have to go on government property, wouldn't you?

A. Yeah.

Q. In order to get there even by water, when the lake is down. So I just want to be sure, do you understand that your situation, if you keep that property, is that you have no road there at all and can only get to it by water if you can get permission to go over property that somebody else owns?

A. Yeah, I understand that.

Q. Now, what are you going to do with that land if you keep it?

A. Well, I want to keep it.

Q. What are you going to do with it?

A. Well, several things I could do with it. (Tr., 191-192).

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 529

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

JOHN BURNS, ET AL.

No. 530

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

FRED LOLLIS, ET AL.

No. 531

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ARNOLD E. BRADSHAW, ET AL.

No. 532

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

PHILIP G. RUST, ET AL.

No. 533

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ABRAHAM COLE HYATT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

G. L. JONES,
GEORGE H. WARD,
Counsel for Respondents.

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ABRAHAM COLE HYATT, ET AL.

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Circuit Court of Appeals (R. 124-133) is reported in 150 Fed. (2) 613. The Opinions of the District Court (R. 8-13) are not reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on July 21, 1945 (R. 133, 135-138, 140-142). The petition for a writ of certiorari was filed on October 19, 1945 and the Writ was granted on December 10, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

The question involved is whether Tennessee Valley Authority (hereafter called TVA) is authorized by law to condemn the Respondents' properties, which, conceded, it does not need for any purpose in the construction, operation or maintenance of the Fontana Dam or Reservoir, but which it seeks to acquire to convey to the Department of Interior for park purposes, and thus to settle TVA's liability to the State of North Carolina, to Swain County and to these Respondents, for flooding a highway.

Statute Involved

The Tennessee Valley Authority Act of 1933, with its several amendments (48 Stat. 58, 49 Stat. 1075, 53 Stat. 1083, 54 Stat. 611, 55 Stat. 599, 575—16 U. S. C. A., Chapter 12A), hereafter called "the Act", is quoted in full in R. 65-95.[1]

Statement

Prior to the hearing of these cases in the District Court the TVA had constructed the Fontana Dam and Reservoir in Swain County in Western North Carolina, near the To-

[1] See Appendix hereto for quotations of the sections of the Act deemed to be pertinent here.

nessee line, and the Reservoir was practically filled with water at that time (R. 23).

The Dam is about twenty miles westerly from Bryson City, North Carolina. The Reservoir lies immediately to the east of the Dam and occupies what was formerly the bed of the Little Tennessee River and the land immediately adjacent thereto.

Until the flooding of the Reservoir, following the completion of the Dam, a road, known as Highway 288, extended along and near the northerly side of the Little Tennessee River, from Bryson City westerly to a point near the present site of the Dam—a distance of about twenty miles as the crow flies and about forty or fifty miles along the road. Immediately to the north of Highway 288, and lying between that road and the Great Smoky Mountains National Park farther on the north, was an area of about 44,000 acres of land. Prior to the purchase by TVA of approximately 38,000 acres thereof (R. 24, F. of F. 34), the area had been inhabited by about 216 families; and Highway 288 had been the sole means of access to their properties.[1]

TVA acquired all of the property which it needed or sought for the construction, maintenance and operation of the Dam and the Reservoir without seeking any of the lands of these Respondents, except a small parcel owned by Respondent Welch, which, by agreement, has been eliminated from this proceeding.[2] However, when the Reservoir had been filled to capacity, Highway 288 was partially flooded.

At a point about one-half mile south of the Rust lands, Nolands Creek had intersected Highway 288. An excellent gravel road approximately paralleled Nolands Creek and

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[1] Petitioner's Br. 9, referring to R 16.

[2] See Map, Exhibit 3 at end of R., showing the area, but not the road.

was and now is the means of access to the properties in the Nolands Creek section.[3]

The lands of all of the Respondents except Welch (aggregating about 6,000 acres) are at distances varying from one-half mile to four miles from the high-water mark of the Reservoir (R. 23 & 24), and are within distances varying from five to eight miles westerly from Bryson City (R. 13 and F. of F. 24 at R. 24, also, see Map, Exhibit 3, at end of R.).

Instead of adopting one or the other of the usual methods of meeting its liability for flooding the Highway, i. e. by supplying a substitute road or by paying damages for the taking, TVA entered into a contract on July 30, 1943, with the State of North Carolina, the Department of the Interior of the United States, and with Swain County (R. 99-113), which embodies the plan for which approval is here sought.

The contract provides, *inter alia*, that TVA would indemnify the State of North Carolina against any claims which might be asserted against it for damage resulting from the flooding of Highway 288; that TVA would pay to Swain County, the sum of $400,000.00, with which to retire the outstanding bonds theretofore issued to finance the original construction of Highway 288; that North Carolina would contribute to TVA, $100,000.00 of the $400,000.00; and that TVA would acquire by purchase or condemnation the entire area of 44,000 acres, served by Highway 288 (except about 2,000 acres thereof owned by North Carolina Exploration Company),[4] and would convey that entire area to the Department of the Interior, to become a part of

[3] Again, see Map (Exhibit 3 at end of R.) showing Rust lands and Nolands Creek flowing into the Tuckasegee River, but again not showing the road; Also R. 24 (F. of F. 32).

[4] See Map (Exhibit 3 at end of R.) for the excepted tract, shown in white near the westerly extremity of the 44,000-acre area.

the Great Smoky Mountains National Park. The Contract then provided that when and if the funds therefor should be made available by Congressional appropriation, the Department of the Interior would construct a super-highway through the area from Bryson City to a point near the Dam (R. 106).

None of the Respondents were invited to participate in the negotiations which preceded the execution of the Contract described above; nor, of course, were any of them parties thereto.

TVA's estimate of the cost of replacing Highway 288 throughout the entire distance from Bryson City to Fontana Dam was $1,400,000.00 (R. 21, 41). If that sum had been expended and the substitute highway had been constructed, of course there would have been no further liability on TVA for flooding 288. Consequently, it is inaccurate to state, as on Page 6 of Petitioner's brief, that in order to estimate the aggregate cost incurred in the substitute-highway method, the value of the fee (estimated at $775,000.00) must be added to the $1,400,000.00. The accurate method of comparison would seem to be as follows: $1,400,000.00 is the estimate of the aggregate cost involved in the substitute-highway method. The estimates on the other hand were as follows: $775,000.00 would be the cost of the acquisition of all of the 44,000 acres (R. 65). To that figure must be added the payment required by the Contract to be made to Swain County ($300,000.00 net). The total estimated costs under the Contract plan would be $1,075,000.00. The expected saving, therefore, by following the proposed method rather than the substitute-highway method would have been $325,000.00. However, those calculations give no consideration whatever to the cost of the super-highway to be constructed by the Department of the Interior, at a cost estimated from $3,000,000 to $4,000,000.00 (R. top

42). Therefore, TVA's proposed plan will ultimately cost the Federal Government $1,075,000.00 plus a maximum of $4,000,000.00 or a minimum of $3,000,000, an aggregate of $5,075,000.00 or $4,075,000.00, as compared with $1,400,000.00, the cost involved in the substitute-highway method, the increased expenditure involved in Petitioner's plan actually being $3,675,000.00,[5] or at the least, $2,675,000.00.

As heretofore pointed out, the properties of the Respondents are located at distances varying from a half-mile to four miles from the high-water mark of the Reservoir (R. 23, 24) and from six to eight miles from Bryson City and none of them have any physical connection with either the Dam or the Reservoir, nor are they needed or sought for use in connection with the Dam or Reservoir. In fact the Petitioner concedes that its sole aim in seeking to condemn these properties is to obtain them for the Park, and thus to extinguish the Petitioner's liability for flooding. Petitioner stated in its brief in the Circuit Court of Appeals (pp. 8 and 9) that the proposed taking was solely for the purpose of discharging its legal obligations arising out of the construction of the project.

The respondents Welch and Burns have waived their respective rights to claim any damages from TVA, from the United States of America, from the State of North Carolina, or from Swain County, "on account of any impairment, interference, or injury" to their respective properties resulting from the flooding of Highway 288. The

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[5] The testimony indicated that the estimated cost of the purchase of property of the North Carolina Mining Company was $50,000.00 (R.). The TVA has heretofore paid $250,000.00 for the easements acquired from the North Carolina Exploration Company (See Contract, R. 113), and it is agreed that approximately 1900 acres shall continue to be the property of the Exploration Company indefinitely. The record does not indicate whether the $250,000.00 paid to the Exploration Company is included in the total estimated cost of the entire area, $775,000.00.

have agreed, in their respective answers herein, to file formal waivers to that effect.[6]

The Rust lands (approximately 4,500 acres of the 6,000 acres, more or less, here sought to be condemned) adjoin the Great Smoky Mountains National Park. They are located at distances varying from one-half mile to four miles from the high-water mark of the Reservoir. Nolands Creek flows southerly from the Park through those lands and into the Tuckasegee River (See Map, Exhibit 3 at end of R.). Several families reside in the Nolands Creek settlement, and travel to and from their homes on a modern road which parallels the Creek and extends to Highway 288 (Map, Exhibit 3 at end of R.). Parts of the Rust land have been improved by private roads and modern residences. They have been piped with running water, and are equipped with electricity generated by Rust's power plant. The property has been used extensively for the growing of timber (R. 23, 24).

The land of the several other Respondents is used chiefly for farming (R. 23 & 24).

After TVA had *purchased* approximately 38,000 acres in the 44,000-acre area (i. e. practically all of the land westerly from Nolands Creek to Deal's Gap) (R. 24) (also see Map, Exhibit 3 at end of R.), it sought to condemn the lands of these Respondents. (Pet. Brief 9, and R. pages there cited.) It will be seen that all of the properties here involved lie within the watersheds of Nolands Creek, i. e. at distances of from six to eight miles from Bryson City (R. 13, 24). The Respondent Welch having released his right to demand a substitute highway and/or damages for the loss of Highway 288, a road of approximately only five to eight miles in length is required to serve the lands of all the other

[6] This is provided in both the Welch and Burns judgments in their respective cases (See R. 1, 2 and 3).

Respondents herein (R. 13, also see Map, Exhibit 3 at end of R.). The estimated cost of such a substitute road is $40,000.00 to $50,000.00 (R. 13).

Each of the Respondents moved for dismissal of the petitions seeking condemnation of his property, on the ground that there exists no legal basis or authority for such condemnation, since no part of any of the land of the Respondents or the material thereon was, or is needed or sought for any use authorized by the TVA Act.

After hearing testimony and arguments and after receiving the Briefs of the respective parties, the District Court dismissed the condemnation petitions; and its decision was unanimously affirmed by the Fourth Circuit Court of Appeals (150 F. (2) 613, R. 124-133).

Comments on Petitioner's Statement of Question Presented

The petitioner has stated the "Question Presented," as follows:

> "Whether, when respondents' easements of access have been taken and destroyed by the Tennessee Valley Authority's permanent flooding of the only highway serving their properties, a court can set aside the determination of the Board of Directors of the Authority, made in good faith and after a careful evaluation of all available alternatives, that the taking of the fee in respondents' properties is necessary to carry out the provisions and purposes of the Tennessee Valley Authority Act."

The fundamental question involved in this case actually is whether TVA is authorized by the Act to condemn the Respondents' properties, which, concededly (Petitioner's Brief 7 and 8; R. 34, 35, 24, 97), it neither needs nor seeks for use in the construction, operation or maintenance of the Dam or Reservoir. Admittedly, those lands have no physical connection with either the Dam or the Reser-

voir, and, if they should be condemned, TVA freely states that these lands will be conveyed to the Department of the Interior to become a part of the Park, as a means of satisfying TVA's liability for flooding the road. (Petitioner's Brief 7 and 8, referring to R. 101-103, 110-111, 63, 103-105.)

The question stated by Petitioner, as *quoted* above, though perhaps incidental to the fundamental issue herein, is material only insofar as it may be said to bear upon the primary question of TVA's authority to condemn the Respondents' properties.

Moreover, in passing, perhaps it should be observed that, whatever may be said about the good intentions or honesty of purpose on the part of TVA's Board of Directors in resolving that Respondents' lands are "necessary for carrying out the purposes of the Act," such motive cannot accurately be described as good faith or proper exercise of discretion in the more technical sense in which those terms have been defined by the Courts in cases similar to the instant one.

To state the fundamental question herein to be whether the "good-faith" decision of TVA to condemn the lands, can or cannot be reviewed by this Court, serves, at the outset of the argument only to confuse the real issue. Obviously, the basic question in the case may be simply stated: Whether the Petitioner is authorized by law to condemn the Respondents' lands.

Introductory Comments on Petitioner's Specification of Errors

The Petitioner has listed eight particulars in which it contends the Court below to have erred (Petitioner's Brief, 10 and 11).

There is little distinction, if any, between the Specifications numbered 1 and 2, respectively. Each challenges the

soundness of the decision below on the fundamental question in these proceedings, viz., whether TVA is authorized to condemn the Respondents' properties.

Specification 3 charges the Courts below with having exercised the prerogative of TVA, i.e., with having determined the "*necessity*" for the taking of Respondents' lands. We believe that a rather casual examination of the Opinion below on this phase of the case will disclose that the lower Court determined, not whether these properties are *necessary* for the Fontana project *proper*—TVA concedes that they are not thus needed—but that the Court passed only upon the question whether the proposed use is a "public use" (R. 129-132). More will be said on this question when the subject of "public use" is discussed *infra*.

On the same tone as in Specification 3, Petitioner charges in Specification 4 that the Court below held that "Petitioner cannot legally condemn a fee interest in lands when, in the opinion of the Court, an easement would be sufficient to meet its requirements." Again, a mere glance at the opinion below will perhaps be sufficient to show clearly that the lower Court made no such determination as is here charged. Again, we say, TVA has conceded that no more than the easement is *required* for any of the purposes of the Fontana project *proper*, and that the fee is sought solely for the purposes of meeting the liability for the taking of the easement and to provide additional lands for the Park (R. 126, 129).

As was observed, in connection with Petitioner's statement of the "Question Presented," it will be seen that again in Specifications of Error 5, Petitioner confuses the factual question of the presence or absence of proper motives with the legal question whether *authority exists* for the action proposed. If the term, "good faith," is intended to be used in Specification 5 as it was doubtless

intended to be used by the District Court in one place among its Findings of Facts (R. 14), i.e., to mean with proper motives, we cannot deny that TVA's Board acted in good faith in resolving to take Respondents' lands. But, obviously, the existence of proper motives or good intentions cannot justify action beyond the limits of one's authority. Consequently, it begs the question for Petitioner to assert, as in Specification 5, that the Court below erred when it substituted its determination for that of TVA's Board "*made in good faith*," and when it decided that Petitioner had no legal authority to condemn Respondents' lands.

In Specification 6, Petitioner has again misinterpreted the decision below. It was not there held that Respondents' lands are sought *solely* for the purpose of transferring them to the Park Service. The Court did hold, however, that such was one of the purposes; and that has been consistently conceded by Petitioner throughout this proceeding (Petitioner's Brief 7 and 8, referring to R. 101-103, 110-111, 63, 103-105).

Specification 7 raises a true issue of law, which is discussed at some length *infra* (Pp. 15-33).

Specification 8 appears to be a contention that if a condemning body takes a road which is the only means of access to privately owned lands and thus renders the lands of little if any value, it may, if it chooses, take all of such lands against the owners' wishes, without limit, and without regard to the use to be made of such lands, provided only that compensation be paid to the owners. Discussion of this contention will also be found *infra* (Pp. 47-49).

Reply to Petitioner's Introductory Argument

When TVA found that its project would flood parts of Highway 288, it evidently gave at least some slight con-

sideration to the customary and the recognized methods of meeting its responsibility therefor. The usual alternatives and the only methods for which any precedent has heretofore existed are (1) the payment of money damages for the loss of the road, or (2) the furnishing of a substitute road therefor. Perhaps, as TVA contends, alternative (1) seemed impracticable, particularly when the entire area (44,000 acres) was under consideration, because parts of it would have been without any means of access after the flooding of Highway 288.

The construction of a substitute Highway is, of course, the method usually followed under such circumstances. In its Statement, and again in its Argument, Introductory, Petitioner stresses the cost of a substitute road.

In the Statement, *supra*, P. 2, calculations have been made to show the comparative costs of TVA's proposal and the substitute-road method, according to the testimony of Petitioner's witnesses. This Court and others have repeatedly held that "excess taking" cannot be justified legally for reasons of profit or even of economy. If, however, the Court should see fit to go into the question of the relative costs and should be influenced thereby, it will undoubtedly find, from the Record, that TVA's proposal will ultimately cost the Government of the United States millions more than the cost of the substitute road (*Supra*, P. 2, and R. top 42).

Furthermore, of course, the cost figures quoted by Petitioner involved the construction of a road to serve the entire area of 44,000 acres, i.e., from Bryson City to Fontana Dam; 38,000 acres thereof, including all of the land westerly from Nolands Creek (except Welch's and lands of North Carolina Exploration Company—not in this proceeding), had been purchased prior to the hearings herein in the District Court (R. 24); consequently, in weighing the practicalities in this case, no substitute road except

one from Nolands Creek to Bryson City need be considered (R. 24, F. of F. 35).

The 4-party Contract provides that the North Carolina Exploration Company, owner of about 1950 acres in the 44,000-acre area, may retain all of its property (R. 102). That Contract further provides for the construction of three roads as means of access to the Exploration Company's property from three different directions (R. 106 (a), (b), (c) and (d)).

It is true that the Record contains some *hearsay* evidence regarding the "informal" advice from the War Production Board that it would not furnish the necessary priorities for the construction of a substitute road for the entire distance of about 50 miles (R. 48, 53-54, 63, 100). It surely seems that more reliable proof should have been adduced in support of that contention, since so much reliance is now placed upon it by Petitioner. One would think that the need for the Fontana project to meet necessities of the war would surely have justified granting the priorities necessary to meet all legal obligations directly involved. Whatever weight may properly be given to the evidence produced, regarding the War Production Board's attitude, there is absolutely no evidence in the record to show that the War Production Board would have refused, or that any successor that it may now or hereafter have, will refuse to release sufficient labor and materials to construct the road for a distance of from five to eight miles. It is not surprising that Petitioner's quotation of the District Court's finding on this subject has been relegated to a footnote (Petitioner's Brief 5), particularly when it appears so clearly from the finding, how different the finding actually is, when analyzed, from the Petitioner's contention on this subject.

We will pause only very briefly to reply to the five accomplishments alleged (on Page 15 of Petitioner's Brief)

to have been attained by TVA through its plan. Perhaps it will suffice to say that the ultimate expenditure of four or five millions of dollars of Federal funds, primarily for the pleasure and benefit of North Carolina, Swain County, and the property-owners who wanted to sell, or who sold their lands to TVA, was, or will be pleasing to the recipients of those pleasures and benefits. If it will not be presumptive for us to do so, we suggest that, particularly in these times, a more economical course would have been more appropriate. However, this Court will doubtless be more interested in, and will, of course, be guided by the principles of *law* rather than by the views of any of us regarding the practicalities, the expediency, or even the desirability of one course as compared with the other.

Summary of Argument

All of the contentions made in this proceeding seem to us to relate to two principal arguments, viz.:

I

The Question Whether the Use to Be Made of Land Proposed to Be Condemned Is One for Which the Condemnor May Properly Exercise the Power of Eminent Domain Is a JUDICIAL QUESTION; *or, to State This in Another Way, the Court May Review Such a Question, and May Determine Whether Such Use Is a* "PUBLIC USE".

II

Nowhere in the Act Nor Among the Precedents Is There Authority for TVA to Condemn Private Properties for the Use or Purpose Here Proposed.

I

The question, whether the use to be made of land proposed to be condemned is one for which the condemnor may properly exercise the power of eminent domain, is a judicial question.

When a public authority seeks to condemn private property, two questions may arise: (1) Whether the property is sought for a *purpose* or a *use* for which the law authorizes condemnation; and (2) Whether the particular property is *necessary* for the fulfillment of that purpose. If the purpose or the use for which the property is to be taken be one for which the law authorizes condemnation of private property, such purpose or use is designated by the Courts as a "public purpose" or "a public use". Those terms have almost uniformly been used in a somewhat limited or technical sense. They have not been accorded broad or literal meanings. As has been pointed out by the Courts,[7] these terms are not used in the sense of public utility, public interest, common benefit or general advantage or convenience, nor synonymously with the more indefinite terms, "public improvement". They are used as a brief way of saying, a use or a purpose authorized by the particular statute under consideration.

When private property is sought to be taken against the will of the owner, if the law should preclude the Judiciary from inquiring whether the use for which such property is sought or whether the purpose for which it is intended to be used is a public use, then a condemnor, merely by resolution, could preclude the courts from inquiring whether the

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[7] *City of Richmond* v. *Carneal* (Supreme Court of App. of Va.), 129 Va. 388, 106 S. E. 403; also Opinion below in instant case, R. 131 and cases there cited.

proposed use is one for which the Statute authorizes condemnation.[8]

It is equally well settled that, if the purpose or the use for which the property is sought be a "public purpose" or a "public use", the question of the *necessity* of the particular property or the *extent* to which property should be taken for such purpose or use, is a *legislative* question, and, when determined by a legislature, or by an agency created for that purpose, is not subject to judicial review.[9]

The two rules were tersely stated in *U. S. v. Vogel*, 28 Fed. Supp. 454, 455 (Dist. Ct. W. D. of Ky., 1939), as follows:

> "It is well settled that while the question whether the purpose of a taking is a public one is judicial — * * * the necessity and the proper extent of a taking is a legislative question."

If, in the instant case, the lands of the Respondents were sought as a site for the dam or even as a source of materials to be used in the construction, as in *Bragg* v. *Weaver*, 251 U. S. 57, or in the maintenance of the dam, the use or purpose would be a public one; and, in the absence of bad faith or clear abuse of discretion, the determination by TVA of the *necessity* of the lands for those purposes would not be subject to judicial review.

However, TVA now concedes that these properties are not sought for any such purpose or use, but to the contrary, that, if acquired, they are to be conveyed to the Department of the Interior for park purposes, as a means of satisfying the liability for destroying Highway 288. Whether such a

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[8] *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 705; *City of Cincinnati* v. *Vester*, 281 U. S. 439, 446.

[9] *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 709; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Shoemaker* v. *U. S.*, 147 U. S. 282; 18 Am. Jur. 734, 737.

purpose or use is one for which the Act authorizes the condemnation of private property is clearly a judicial question. The recital in the reslution passed by the TVA Board of Directors, that the lands are necessary for the carrying out of the *purposes* of the Act, *cannot* and *does not* preclude the Court from examining that question.

The case of *City of Cincinnati* v. *Vester, et al.*, 281 U. S. 439, was decided in 1930. A reading of the opinion of Mr. Chief Justice Hughes in that case discloses that the facts and the contentions of the City there were rather strikingly similar, in many respects, to those in the instant case. The question there presented was whether the City of Cincinnati was authorized by law to condemn certain portions of the properties of the Respondents in connection with the widening of a street. An incidental question there, as here, was whether the Court could properly review a determination by the City Council of the propriety of the proposed taking. The Council's determination had been evidenced by an ordinance, quite similar to TVA's resolution here.

The resolution (presumably a preamble to the Council's resolution) declared the intention of the City to appropriate a strip of land twenty-five feet in width immediately adjacent to the street to be widened, and no question was raised concerning the validity of the condemnation of that strip. The controversy related to the proposed condemnation of three lots of land, in addition to the twenty-five foot strip, lying between the street as widened and other nearby streets. That proposed condemnation was referred to as the "excess condemnation".

The Constitution of Ohio provided substantially that a municipality might condemn for public use or in furtherance of a public use, property appropriate therefor. It further provided that a municipality might acquire an excess over that actually to be occupied by the improve-

ment and might sell such excess with such restrictions as might be appropriate to preserve the improvement made."[10]

A statute of Ohio provided that when it was deemed necessary to appropriate property, the City Council should pass a resolution declaring such intent and defining the purpose of the appropriation. The statute also provided that, for the purpose of creating reservoirs to supply water, "the council might appropriate such property as *it may determine to be necessary*". (Emphasis supplied.)

The TVA Act (Sec. 4(h)), authorizes TVA "* * * to exercise the right of eminent domain * * *", and provides that all real estate thus acquired "* * * shall be entrusted to the Corporation * * * to accomplish the purposes of this act * * *." The TVA Act also provides (Sec. 4(i)) that "* * * the corporation may proceed to exercise the right of eminent domain, and to *condemn all property that it deems necessary for carrying out the purposes of this Act*, * * *." (Emphasis supplied.) The similarity between the provisions of the Ohio statute in the *Cincinnati* case and those of the Act in the instant one is apparent.

The resolution of the Cincinnati City Council stated the purpose of the proposed "excess condemnation" as being "*in furtherance of the said widening of Fifth Street*", and "*necessary for the complete enjoyment and preservation of said public use.*" The ordinance also declared the proposed condemnation to be "*for the more complete enjoyment and preservation of the benefits to accrue from said*

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[10] The portion of the Ohio Constitutional provision paraphrased above reads as follows:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. * * *."

public use." (Emphasis supplied.) Again, the striking similarity between the language of that ordinance, on the one hand, and the contentions of the Petitioner with respect to the public and sociological benefits to be attained through the condemnation of Respondents' lands, is, we think, rather significant (Petitioner's Brief 18).

In the *Cincinnati* case, the City argued that in resorting to excess condemnation, legislative bodies generally have had in view the following three purposes: "(1) the avoidance of remnant lots, (2) the preservation and amplification of the improvement, and (3) the *recoupment of expense* from increased values."—not unlike Petitioner's arguments in this proceeding. (Emphasis supplied.)

At this point, perhaps attention should be called to the fact that the provision of the Constitution of Ohio, quoted in Footnote 10 herein, expressly authorized the City to "appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made." The difference between that Constitutional provision and the more limited authority granted to TVA, in Section 31 of the Act (R. 95), relied upon so heavily by the Petitioner here, is likewise significant.[11]

It would seem that in the *Cincinnati* case, with *express constitutional* authority for condemnation of excess property, the City was on a much firmer foundation, in its

[11] Nowhere does the TVA Act *expressly* authorize the Petitioner to condemn more land than is actually needed for the construction, operation or maintenance of its projects. Section 31 of the Act, by implication or by inference, perhaps can be said to show that Congress contemplated that on some occasions TVA might find it convenient to "*purchase*" what one of the Reports of the House Committee which made recommendations with respect to the Amendment of 1935 (Section 31 of the Act) described as "little peninsulas". (See Appendix hereto, Page 57). This will be discussed under Argument II, *infra*.

attempt to recoup expense by the excess taking there, that is the Petitioner in the instant case, with neither constitutional nor statutory authority for any such excess taking as is proposed here.

As above stated, one of the primary questions in the *Cincinnati* case, was whether the Court could properly review the determination made by the City Council. In that connection, Mr. Chief Justice Hughes made this statement (281 U. S. 446):

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

In passing upon the question of the effect of the City ordinance, the Court used this language (281 U. S. 447):

> "* * * Under the provision of the Constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital."

The Court held that the condemnation of the lots (the "excess taking") was not authorized by law.

Finally, in the opinion of the Court, in the *Cincinnati* case, which expressed a unanimous decision, we find the following statement with regard to the question of the ultimate use to be made of the "excess property":

> "It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation."

Petitioner contends that the Court below, while giving lip service to the well-settled principle that the *necessity* of a particular taking for *public use is a legislative* and not a *judicial* question, departed from that rule when it decided that the taking of Respondents' lands would be "excess condemnation"[12] Petitioner charges that in so doing, the Court below ignored the decisions of this Court and of other tribunals.[13] The case at the top of Petitioner's list at that point in its brief is one upon which it also leaned heavily in the Court below, *Old Dominion Land Co.* v. *United States*, 296 Federal 20 (C. C. A., 4th, 1924), Aff'd. 269 U. S. 55, 70 L. Ed. 162. Although Petitioner has not seen fit, in its Brief, to discuss that case even casually, perhaps we should give some attention to it, since both here and below it tops Petitioner's list.

During World War I, the Government had leased certain lands in Newport News, Virginia, from the Old Dominion Land Company for a period of one year. The lease contained a provision authorizing its renewal for the period of the War and for the time necessary for the return of our troops from Europe. It also provided that all buildings and improvements erected by the Government on the lands leased should remain the property of the Government, with the right of removal during the lease or during

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[12] Petitioner's Brief 41.

[13] Petitioner's Brief 42, citing several cases.

the period of its renewal and within thirty days of the expiration of the term of the last renewal. The Government constructed Quartermaster Warehouses and other improvements on the property as an Army Supply Base, at a cost of $1,522,000.00. The Land Company refused to renew the lease after June 30, 1922, and gave notice that it would hold the Government to its contract-period of thirty days thereafter within which to remove the warehouses. The Secretary of War was unsuccessful in his attempt to agree with the Land Company on a price to be paid by the latter for the improvements to be left on the land, and condemnation proceedings were instituted, pursuant to the authority vested in the Secretary of War by *express* provisions of a statute.

It was contended on the part of the Land Company that the Government was attempting to condemn land in order to recoup the value of the improvements placed thereon and that it had no intention of using the land for any public purpose. In answer to the landowners' contention, the Circuit Court said (296 Fed. 22):

> "The Court cannot deny the truth or good faith of *express declaration in the Statute* that the property is to be taken for the plainly public use of Quartermaster Warehouses." (Emphasis supplied.)

The United States was in possession of the Old Dominion Land Company's property sought to be condemned and was using it for the purposes above stated.

The question of excess taking was not even discussed in the opinion. Nothing in the opinion militates against the fundamental principles announced and adhered to by all of the Courts, prohibiting the condemnation of property in excess of that expressly authorized by law.

If it can possibly be said that the decision of the United States Supreme Court, in the *Old Dominion* case, is in any

respect contrary to the later decision of the same Court in *City of Cincinnati* v. *Vester*, 281 U. S. 439, 74 L. Ed. 950 (1930), *supra*, it is, of course, proper to say that, to such extent, the *Old Dominion* case has been overruled by *Cincinnati* v. *Vester*. However, we believe that this Court will find that the facts in the *Old Dominion* case are clearly distinguishable from those in the *Cincinnati* case and from those in the case at bar. In the *Old Dominion* case, as was explained in the opinion of the Court, delivered by Mr. Justice Holmes (269 U. S., pp. 63, 64 and 65), a statute, passed by Congress in 1919, had stopped the purchase of land for military purposes generally. However, amendments thereto had *specifically appropriated funds for the acquisition of these particular lands*, then under lease. The opinion of Justice Holmes, on the effect of the exception contained in the amendment, is in part as follows:

> "It is argued that the general purpose of this exception to the stopping of expenditures was only to carry out agreements by which the Government already was bound: and that the specific appropriations were made only in case the property mentioned was the object of such previous agreement. No doubt the general purpose was that suggested, but the rest of the Act showed that the appropriation was not confined to that alone, and the *specific unqualified mention of the land in question as land of which the acquisition was to be completed overrides the general statement, however much confirmed by citations from the congressional debates.*" (Emphasis ours.)

It will be seen from a careful reading of the opinion in the *Old Dominion Land Company* case that, as Judge Parker pointed out below, that that decision was based upon the ground that "Courts must accept the purpose of the acquisition of the property as declared in the Act of Congress under which it was condemned."

The Deficiencies Appropriation Act, pursuant to which the property was condemned in the *Old Dominion* case, not only stated the acquisition of the property in question to be for a "public use", but that Act described one of the purposes for which the appropriation was made and for which condemnation was authorized when the property could not be purchased, thus:

> "Sites for military purposes: For completion of acquisition of real estate as authorized by" (here reference is made to a former Appropriations Act) "For quartermaster warehouses, Newport News, Virginia, $223,670.

Furthermore, of course, quartermaster warehouses clearly serve "military purposes."

Perhaps if the use to be made of the lands sought in the case at bar was even remotely related to the purposes for which TVA was created and for which it was expressly authorized to acquire real estate, or, if, as in the *Old Dominion* case, the Act expressly appropriated funds for, or specifically provided for the acquisition of the lands here under consideration, there would be an analogy between the *Old Dominion* case and the instant one.

As is true of the *Dominion Land Company* case, immediately *supra*, an examination of the facts and the decisions in each of the several other cases cited by Petitioner[14] (in connection with its contention that the lower Court trespassed upon TVA's prerogative) will demonstrate clearly the *factual* distinction between each of those cases and the case now before the Court. In our "Brief in Opposition" to the application for certiorari, we analyzed each of those same ten cases, except *Coggeshall* v. *United States*, 95 F. (2) 986, which we will now discuss.

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[14] Petitioner's Brief 42.

Coggeshall v. *United States*, mentioned immediately above, is the only one of the ten cases cited at the top of Page 42 of Petitioner's Brief which was not cited in support of the application for certiorari and was, consequently, not discussed in our Brief in Opposition. In that case, the landowner had granted to the United States an option to purchase his land in South Carolina. The option contract provided in substance that in case the title should be unsatisfactory, condemnation proceedings might be instituted. The title proved unsatisfactory, and the appellant was notified that a suit to condemn would be filed. That was done, evidence was taken regarding the value of the lands, and an award was made. Thereafter, the appellant petitioned the Court to set the entire transaction aside on several grounds, one of which was that the Government had no Constitutional right to take the lands, because no navigable stream had been involved. The Fourth Circuit Court of Appeals held that the determination of the question involved was within the discretion of the District Court, and that that Court's determination would not be set aside in the absence of clear proof of abuse of discretion. The Circuit Court pointed out, in its opinion (Page 989), that no evidence had been presented on the question whether a navigable stream had been involved, or whether the land in question was actually necessary for the purpose for which it was sought. It was further held that because the appellant had made no opposition to the entry of the order on the award and had taken no exception to anything done in the suit the judgment of the lower Court would not be disturbed. The decision was based solely on the rule that the matter was within the discretion of the trial Judge and that there was nothing in the record to justify the Court of Appeals in holding that the discretion had been abused (Page 990).

That case is obviously not analogous to the instant one.

United States v. *Meyer*, 113 F. (2) 387 (C. C. A. 7), cert. denied 311 U. S. 706, was discussed at considerable length in our Brief in Opposition,[15] and the remaining eight cases cited on Page 42 of Petitioner's Brief here, were also digested in our Opposition Brief. We believe that this Court will find that each of those cases is clearly distinguishable from the instant one.[16]

Petitioner contends that the use to be made of Respondents' land is for "reservoir purposes."[17] In support of that assertion, Petitioner refers back to prior pages in its Brief wherein, among others, is found this statement[18]:

> "A large reservoir project may flood many square miles of land, inundating highways and railroads, water and sewage mains, power lines and other utility facilities, courthouses, schools, and even whole towns or villages."

Although some reservoirs may flood some or even all of the several types of properties enumerated above, in the case now under consideration, Petitioner agrees—we understand—that no part of the lands here in question have been, or are to be flooded by the reservoir.[19] Its high-water mark is at least one-half mile distant from the nearest boundary of the nearest of these properties. Moreover, as Judge Parker put it, it is not proposed "to take stone or timber" from these properties or to use them "for any of the purposes for which the TVA had been created." All of these lands, if condemned, would be conveyed to the Park Service. Certainly, it would be a severe strain upon that term to attempt to denominate the use

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[15] Brief for Respondents in Opposition 7-11.

[16] Brief for Respondents in Opposition 15-21. The *Meyer* case is also discussed *infra*, p. 47.

[17] Petitioner's Brief 42.

[18] Petitioner's Brief 26.

[19] Pet's. Br., p. 9.

proposed to be made of these lands as "reservoir purposes."

Brown v. *United States*, 263 U. S. 78, and *Dohany* v. *Rogers*, 281 U. S. 362, are said by Petitioner to involve situations similar to the one before us here, and, therefore, to be controlling.

In *Brown* v. *U. S.*, on which substantial reliance was placed by the Petitioner in the Court below as well as herein,[20] the facts were briefly as follows:

The damming of the Snake River flooded three-fourths of the town of American Falls, Idaho. The Act of Congress there *specifically authorized the condemnation of sufficient land for a new town-site, to replace the flooded portion*, also expressly provided for the removal of the buildings to the new site, and finally, for the sale of any lots remaining in the area condemned, not used in exchange for the flooded lands. Brown opposed the condemnation, contending that, the object being to condemn his land for exchange and or sale to another, it was not for a "public use," but was unconstitutional. This Court, in affirming the decision below, pointed out that the town was an important one for its section; that three-fourths of its streets, alleys and parks would have to be abandoned, as would all of the buildings (private and public) in the portion to be flooded unless they could be moved to new locations nearby, and that because of the topography of the land, they could be moved only to the gradually rising ground east of Snake River; that the land sought to be condemned was the only available place to which the flooded part of the town could be moved practicably so as to be united with the one-quarter remaining; and that the acquisition of the new town-site was expressly authorized by the Act and was a natural and proper part of the construction of the dam and reser-

[20] Petitioner's Brief beginning on Page 29, also on Page 36.

voir, to make provision for a substitute town as near as possible to the old one.

The opinion of Chief Justice Taft was in part as follows:

> "A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution" (263 U. S. 83).

It will be borne in mind that in the *Brown* case Congress had specifically authorized the lands in question to be condemned for the purposes for which they were condemned. The condemnation there would be comparable to a condemnation here of sufficient of the lands of the Appellees to replace Highway 288, as more fully appears from our reference to the *Feltz* case immediately *infra*.

In the case of *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 Fed. (2) 578 (C. C. A., 8th, 1942), the facts were as follows:

The Power Company, given the right of eminent domain by appropriate legislation, while in the construction of a dam and reservoir on the North Platte River in the State of Nebraska, flooded U. S. Highway 26. The Power Company recognized its duty to relocate the highway and thereupon instituted this action to condemn a new right of way over the lands of Feltz in lieu of Highway No. 26, which would be submerged.

The landowner Feltz took the position that the Federal District Court had no jurisdiction to entertain the condemnation because the lands were not required for the dam site or for the reservoir of the project, but were required only for the new relocated United States Highway No. 26, agreed to be substituted for old United States Highway No. 26, taken for the project.

In disposing of Feltz's appeal, the Court said (p. 582):

> "It must be conceded that there are situations in which an attempted taking of land may be too remote from the scope of an authorized improvement to be sustained. But in this case we think it resulted from the public interests involved in the maintenance of the public highway as a part of the Highway System of the United States and the public interest in the development of the power and irrigation improvement that the work of highway relocation aided and contributed in a secondary way and was 'accessory' and 'in conjunction with' the District's improvement and the District's power to condemn must be sustained under the decisions of the Supreme Court in *Brown* v. *United States*, 263 U. S."

We have an example here of what Mr. Chief Justice Taft referred to in the *Brown* case, *supra*, as "substituted compensation".

TVA's argument is that the condemnation of the 44,000 acres of land, and, in particular, the lands of these Respondents, is so closely related to the construction of the Fontana Dam as to be accessory and incidental thereto. Because the construction of the dam is an authorized function of TVA, it is argued, any act of eminent domain which tends to serve that function is bound up with the construction of the same and acquires validity and sanction from that relationship. It is apparent that the proposed condemnation in the instant case is extremely remote from the legitimate function of TVA.

Reasoning from the premise that condemnation by extinguishment of the area in question is sufficiently close to the principal project to be an integral part thereof (and, therefore, valid), TVA, in the instant case, proposes to build an entirely novel proposition in the law. Its argument, pursued to a finality, is that the Constitution imposes upon

it the obligation to compensate the Respondents; that circumstances make it impossible to relocate the highway, ergo, since the obligation must be discharged somehow, the land which the road would serve, namely, the 44,000 acres, including the Respondents' lands, should be, itself, condemned, so that the obligation to relocate can no longer exist.

In this connection, it is important to remember that substituted compensation is, as the name suggests, simply an alternative to money damages. The original method of compensation, in eminent domain, was the payment of money damages, and any other form of compensation was considered improper. Thus, in *Nichols on Eminent Domain*, Second Edition, Volume 1, Section 205, page 625, the following comment is made:

> "If a definite taking has been actually made * * * the condemning party cannot mitigate the damages by offering to * * * build something for the owner to replace a convenience that he has lost."

And, in *Lewis on Eminent Domain*, Third Edition, Volume 2, Section 756, the following appears:

> "The commissioners or other tribunal to assess damages have no authority to give compensation in anything but money."

Upon that original doctrine of compensation in money, Chief Justice Taft granted the exception in the *Brooks* case, *supra*, describing it as "compensation by substitution". It must be borne in mind that it is the condemnor who has the choice of furnishing either method of compensation, to-wit: money damages or compensation by substitution. It must likewise be borne in mind that the condemnor cannot be compelled to provide one rather than the other.

If the doctrine of substituted compensation is to be extended by analogy, the rationale underlying that doctrine must be examined. As above stated, perhaps the only expression of that rationale is the excerpt quoted heretofore from Chief Justice Taft's opinion in the case of *U. S. v. Brown, supra.*

> "A method of compensation by substitution would seem to be the best means of making the parties whole."

If the rationale of the rule is making the parties whole again, that is to say, restoring the *status quo* so far as that is possible, then the new doctrine of compensation by deprivation cannot claim the support of a supposed analogy. For compensation by deprivation means compensating the the landowner, not by restoring the status quo, but by taking away from him more than is needed or justified.[21] This is the very antithesis of restoration of the *status quo*. It means the creation of an entirely new situation, and, obviously, finds no support in the procedure followed in the case of *Brown v. U. S.*

In *Dohany v. Rogers*, 281 U. S. 362,[21] the Highway Commission of Michigan, in reconstructing and widening a road, adjoining for several miles a railroad right-of-way, contracted to acquire the right-of-way, in exchange for certain other lands, sought to be condemned for relocation of the railroad. The appellant, whose lands were sought, brought suit to enjoin the condemnation thereof. It will be observed at once that the facts here are comparable to those in the *Brown* case, *supra*, and even more analogous to those in the *Foltz* case, *supra*. In each of those three cases, the method followed was what Chief Justice Taft, in the *Brown* case, characterized as "substituted compen-

[21] Relied upon on Page 30, Petitioner's Brief.

sation", which is exactly the procedure, we respectfully submit, that should now be followed in the instant case.

If, in the present proceeding, as occurred in *Feltz v. Central Nebraska Public Power Co.*, 124 F. (2) 578, (C. C. A. 8—1942), and in so many other similar situations since *Brown* v. *U. S.* (See R. 61), the condemning agency were seeking to acquire lands of the respondents for a right-of-way to replace 288, we would certainly not be here objecting. Such a method would, if followed now, enable TVA, at least for all practical purposes, to meet its remaining liability to North Carolina and to Swain County, and finally to these landowners, for the loss of 288. It will be relatively very inexpensive, because Respondents Burns and Welch have definitely waived their claim for any substitute highway or for damages; the damages suffered by the other respondents have been relatively small to date; and, finally, the cost of replacing 288 from the Nolands Creek Road to Bryson City (which will meet the needs of the remaining respondents and will fully satisfy them) will be almost negligible, comparatively speaking (R. 21, 209-210). Perhaps, in our discussion of the cases cited by Petitioner in support of its contention that the Court below exceeded its authority, in reviewing TVA's determination that Respondents' lands should be condemned, we have seemed to wander afield from the question whether the proposed taking here is for a "public use". Perhaps we should conclude our discussion on that subject with a quotation from the opinion in an early case, *Bloodgood* v. *Mohawk & H. River Co.*, 18 Wend. 9, 31 Am. Dec. 313, 356, cited with approval in *City of Richmond* v. *Carneal* (Supreme Court of App. of Va.), 129 Va. 388, 106 S. E. 403, also cited by the Court below herein (R. 131):

> "When we depart from the natural import of the term 'public use', and substitute for the simple idea

of a public possession and occupation, that of public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term 'public improvement', is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us. * * *."

II

Nowhere in the Act nor among the precedents is there authority for TVA to condemn private properties for the use or purpose here proposed.

The first of what perhaps may be designated as our Adversary's *legal* contentions, in the order in which he has stated it, is that the Act confers upon the Petitioner "the full *constitutional power* of the Federal Government to condemn lands *for the purposes of the Act*".[22] (Emphasis ours.) Of course, no reference is made in Petitioner's brief to any specific provision of the Federal Constitution wherein the power of eminent domain is granted to TVA. In fact, as this Court well knows, the power to take private property for *public use* does not spring from the Constitution, but is said to be inherent in the sovereign.[23]

The only Federal Constitutional provisions which refer specifically to this power, place *limitations* upon it, viz. the

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[22] Petitioner's Brief 11 (in I of Summary), 12 (in II of Summary), and in bold type on 16.

[23] 18 Amer. Jur. 635, citing *Georgia* v. *Chattanooga*, 264 U. S. 472, 480; *Kohl* v. *U. S.*, 91 U. S. 367, 373; and scores of other cases there cited; also *In re Wanisimmet Co.* (Supr. Jud. Ct. of Mass.—1911), 209 Mass. 1, 95 N. E. 293.

Fifth Amendment, prohibiting the taking without just compensation, and the Fourteenth Amendment, prohibiting the States from taking without due process of law. Doubtless, it is proper to say, as have the Courts at times, that those limiting provisions impliedly recognize the existence of the power of eminent domain in the governments, Federal and State. However, it scarcely seems accurate to refer to TVA's power of eminent domain as "the full *Constitutional* power of the Federal Government", unless perhaps the Constitutional limitations are intended to be emphasized here—and we believe that to be unlikely.

As was seen in the case of *City of Cincinnati* v. *Vester*, *supra*, p. 17, occasionally, at least, State Constitutions contain express grants of the power of eminent domain to municipalities;[24] but, of course, there is no corresponding Federal Constitutional provision conferring that power upon TVA.

We have directed the Court's attention to the source or basis of eminent domain, not to be specious or facetious with our Adversary, but in an effort to approach the question of TVA's power here from a background which furnishes an accurate setting.

It has been said that the power of eminent domain rests entirely with the legislature and lies dormant until the legislature sets it in motion. In *18 Amer. Jur. 637*, we find this statement, which appears to be amply supported:

> "Under the customary division of governmental power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power is wholly legislative and there can be no taking of private property for public use against the will of

[24] In *City of Cincinnati* v. *Vester*, *supra*, p. 18, 281 U. S. 439, at 441, there is quoted such a provision in the Constitution of Ohio.

the owner without *direct* authority from the legislature." (Emphasis supplied.)

All of the sections of the Act deemed to be pertinent in this proceeding are contained in the Appendix hereto.[25]

The opening sentence of the Act (Title 16 U. S. C. A. Sec. 831) states the *general* purpose of the creation of TVA to be:

1. To maintain and operate properties in the vicinity of Muscle Shoals "in the interest of the National defense and for agricultural and industrial development."

2. To improve navigation in the Tennessee River.

3. To control destructive flood waters in the Tennessee River and Mississippi River basins.[26]

TVA's power of eminent domain is granted in Section 4(h) of the Act (Title 16, U. S. C. A., Sec. 831c(h)), as follows:

"(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act."

Section 4(i) of the Act (Title 16 U. S. C. A., Sec. 831c(i)) authorizes TVA "to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses and other structures, and navigation projects" and "to condemn all property that it deems necessary *for carrying out the purposes of this Chapter.*" (Emphasis supplied.[27]

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[25] See also R. 65-95 for full text of Act.

[26] See Appendix hereto, page 53, *infra*, for full text of this section.

[27] See Appendix, page 53, *infra*, for full text of Section 4(i).

Section 25 of the Act (Title 16, U. S. C. A., Sec 831x) provides that TVA "may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements or rights of way which in the opinion of the Corporation, are necessary to carry out the provisions of this Act."[28]

Finally, Section 31 of the Act, an amendment in 1935 (Title 16, U. S. C. A., Sec 831dd, found at Page 600 of Title 16, U. S. C. A.), added the following provisions:

> "Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: PROVIDED, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in Section 4(k) of this Act."

The sections paraphrased and quoted above are those chiefly relied upon by Petitioner for its authority to condemn Respondents' lands.

Although the Petitioner asserts that it has "the full constitutional power of the Federal Government to condemn lands for the purposes of the Act," we assume that it claims no powers beyond those granted to it in the Act. In the condemnation petitions herein (Par. 5), it is alleged:

> "That pursuant to the authority contained in the Tennessee Valley Authority Act, a dam, said dam being

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[28] See Appendix, Pages 56 and 57, *infra*, for full text of Sec. 25.

known as Fontana Dam *for the purpose of promoting national defense, navigation, and the control of the flood waters of the Tennessee and Mississippi Rivers is being constructed* * * *." (Emphasis supplied.)

Paragraph 6 of each of those petitions contains this allegation:

"The corporation has caused surveys to be made of the said Fontana dam site, of the land which will be flooded as the result of the construction of Fontana Dam and of the other lands which the Corporation will need in connection *with the construction of Fontana Dam*, and the Corporation has determined that the property hereinafter described will be necessary for carrying out the purposes of the Tennessee Valley Authority Act." (Emphasis supplied.)

The Courts have uniformly held that, although consideration should be given to the *principal* purposes sought to be accomplished by a statute authorizing condemnation, such statute must be strictly construed, because "the power of eminent domain is more harsh and peremptory in its exercise and operation than any other."[29]

One leading text-writer on Eminent Dougain (*Nichols*, (2nd Ed.), Volume 2, pp. 987-989), has stated the rule thus:

"One of the most firmly established principles of the law of eminent domain is that the burden is on a party seeking to exercise the power to show an express warrant from the legislature. The power of eminent domain will never pass by implication, and even when the power has been expressly granted, the grant will be construed strictly against the grantee and he will not be allowed to take the lands of another unless he

[29] *1 Lewis, Eminent Domain* (3rd Ed.), p. 708, citing a long list of supporting decisions including *Mills* v. *St. Clair County*, 8 How. 569.

> comes clearly and unmistakably within the limits of his authority. On the other hand, while it is right that private property should be protected in every reasonable way, the exercise of eminent domain is not opposed to public policy, but is often essential to the public welfare, and a statute authorizing the exercise of the power, while it should be construed strictly, should be enforced in such a way as to effectuate the purpose for which it was enacted.

Perhaps at this point, at the expense of repetition, it should be stated that, in giving consideration to the purposes stated in the TVA Act, it must, of course, be borne in mind, as has already been seen, that the question, whether the *purpose* for which these lands are sought is one for which the Act authorizes condemnation, is a *judicial* question; and TVA's Board could not and did not preclude a determination of the question by the Courts, by passing a resolution declaring the Board's judgment on that question.

The sections of the Act set forth above relate the purposes for which TVA was created, viz. the operation of Muscle Shoals, Alabama, in the interest of national defense and for agricultural and industrial development, and to improve navigation and control the destructive flood waters in the Tennessee River and Mississippi River Basins. Those of the other sections paraphrased and quoted above, which grant to TVA the power to condemn lands expressly limit that power to the taking of such lands as are necessary "to accomplish the purposes of this Act", or, as stated in Section 4(i), "for carrying out the purposes of the Act." When the section reciting the purposes for which TVA was created and the sections authorizing condemnation of property for those purposes, are read together, it will, we are confident, be as crystal clear to this Court, as it was to each of the Courts below that the pur-

pose for which these Respondents' lands are sought is *not* one for which the Act, either expressly or by "necessary implication", authorizes condemnation.

But, we are referred by Petitioner to other sections of the Act and to the "legislative history" of Section 31.[30]

The first of those sections to which our attention is called is 4(1), a part of the Amendment of 1935. It reads as follows:

> "(1) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of lands, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end (49 Stat. 1080)."

The only situation among those mentioned in Section 4(1) (above) that even remotely approaches the instant one is "readjustment of the population displaced by the * * * acquisition of rights-of-way * * *." Surely that provision was intended only to authorize TVA, as the language states, to "advise and cooperate" in the readjustment of the population, if they be rendered homeless by the taking of their residences by TVA, in the acquisition of rights-of-way—obviously not true of these Respondents here, and certainly not if the accepted method of "compensation by substitution" be followed. The construction of the necessary substitute road here would not "displace the population" of the lands here, but would serve them.

The next section of the Act relied upon by Petitioner is the portion of Section 4(k),[31] which authorizes TVA to

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[30] Petitioner's Brief, Pp. 18-21.

[31] See Appendix hereto, Page 54, *infra*, for full text of Section 4(k).

dispose of real estate acquired by it, for "* * * the purpose of recreation or use as a summer residence, or for the operation of such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose; * * *," or for "* * * the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: Provided, That no transfer authorized herein in (b) shall be made without the approval of Congress; * * *."

Surely, Petitioner can find no support in the above section for its claim of the right to condemn a large area beyond that needed for any use in its project, but sought for the admitted purpose of conveying it to the National Park Service.

Particular emphasis is placed by Petitioner on Section 31 of the Act, also a part of the Amendment of 1935. Perhaps, therefore, the full text of that section should be quoted here:

> "Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: Provided, That any land *purchased* by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act." (Emphasis supplied.)

Petitioner contends that the "legislative history" of Section 31 shows that Congress, in that section, intended to grant to TVA, the power to *condemn* such areas as the 44,000 acres, and for the *use* proposed to be made of that area. Reference is then made specifically to the Majority Report, to the Minority Report of the House Committee on Military Affairs, and to a portion of Section 31, as ultimately enacted.

Petitioner points out that the Majority Report recommended the enactment of a provision prohibiting the acquisition or holding of more real estate than "necessary to carry out its plans and projects actually decided upon requiring the use of such real estate."[32] The reasons advanced by the Majority were that the TVA should not "go into the real-estate business," and that "The *buying* and selling of real estate not actually necessary for carrying out actual plans of navigation and flood-control would have no proper logical or legal relation to regulating interstate commerce." (Emphasis supplied.) Finally, the Majority stated:

> "* * * The *buying* and selling of land not necessary for developing navigation, and having no proper logical and legal connection therewith cannot be constitutionally authorized nor constitutionally exercised. *Any lands actually needed can be acquired by eminent domain.*" (Emphasis supplied.)

Petitioner points out that two of the Representatives on the Committee, in their Minority Report, stated:

> "* * * in some sections in the reservoir areas, *little peninsulas of land* are necessarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has

[32] The complete statement of the Committee's Majority on this subject is quoted on Pages 57 to 59, *infra*, of Appendix hereto.

> been found much cheaper to *buy up* the land in peninsulas than to construct new roads along the steep mountain sides * * * to prohibit the acquisition of *such lands*, obviously, would greatly increase the cost of the project." (Emphasis supplied.)

In connection with their comments on the Norris, Wheeler and Pickwick reservoirs, those Members of the Committee also stated:

> "* * * A program of soil protection and forestation *essential to the protection of the reservoirs* is being developed for these lands, but cannot wisely be adopted until further work has been done on it. These lands were not *purchased* haphazardly. * * *" (Emphasis supplied.)

In quoting from the Reports of the Committee and from the text of the Amendment as enacted (Sec. 31), we have attempted to emphasize, by the use of italics, the fact that both the Minority and the Majority of the Committee, in considering the proposed prohibition against the *acquisition of any land whatsoever* beyond that to be included or used within the projects of TVA, clearly had in mind only the possibility of TVA's *purchasing—not condemning*—such small areas as "little peninsulas of land * * * necessarily isolated." It will be readily observed that the Majority Report contained the very definite and lucid statement that "Any lands actually needed can be acquired by eminent domain."

Moreover, the Amendment (Sec. 31) as enacted, provides for a liberal construction of the Act—not in order to permit TVA to *condemn* enormous areas, neither needed nor sought for use in its projects—but merely "* * * to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting *Government properties entrusted to the Author-*

ity * * *." The Amendment also directs that, "* * * Provided, That any land *purchased* by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act." (Emphasis supplied.) Again, it will be observed that the Amendment itself refers only to land "*purchased*." Surely this legislative history contains nothing to abrogate the settled principles universally applied in the construction of statutes authorizing condemnation of private property. On the contrary, at least as we see it, the most that can be said here is that Congress, in Section 31, rather reluctantly acquiesced in the *purchase*—but clearly not in the condemnation—of even "little peninsulas of land * * * necessarily isolated," "* * * essential to the protection of reservoirs" or perhaps necessarily purchased to avoid foolish impracticalities.

Certainly, only a very strained construction of Section 31 of the Act would enable Petitioner to find therein authority for condemnation of an area of the magnitude here proposed for the purpose for which these lands would be used if condemned. *Lewis on Eminent Domain* (3rd Ed.), Volume 1, Page 679, in speaking of statutes authorizing the taking of private property for public use, clearly sets forth the rule which seems to be controlling here:

> "371 (240). THE AUTHORITY TO CONDEMN MUST BE EXPRESSLY GIVEN OR NECESSARILY IMPLIED. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. 'There must be no effort to prove the existence of such high corporate right, else it is in doubt;

> and, if so, the State has not granted it.' If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be *acquired by contract*." (Emphasis supplied.)

The Author of the above-quoted text cites a decision in which "commissioners were empowered to select a site for a city hall, either certain lands owned by the city or any other lands, and to cause a city hall to be erected thereon, it was held by the Court of Appeals of New York, that, in case land not owned by the city had been selected, there would have been no power to condemn, and, if the commissioners *could not have agreed with the owner*, they could have proceeded no further in the matter.[33]

> "* * * That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and *private property should be held sacred*. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention." (Emphasis supplied.)

Petitioner cites *United States* v. *Meyer*, 113 F. (2) 387 (C. C. A. 7), cert. denied 311 U. S. 706, as authority for the "excess condemnation" sought here. In fact, that

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[33] *People ex rel. Hayden* v. *City of Rochester*, 50 N. Y. 525.

case is cited in six places in Petitioner's Brief. Perhaps, therefore, we should recite here the facts in that case and the bases for the decision.

The case involved the Rivers and Harbors Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. § 591, which authorizes the Secretary of War to acquire by condemnation any land needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors, for which provision has been made by law. The Secretary of War sought to condemn the fee to the lands of the defendants. They resisted, contending that the Secretary's action was not characterized by good faith but constituted an abuse of his discretion, for the reason that a title in fee simple was not necessary for the accomplishment of the purpose of the project. Defendants offered in evidence a letter from the Chief of Engineers of the War Department to a Senator, in which—to use the language of the Seventh Circuit Court of Appeals—"the writer indicated that in the pools of the lower reaches of the improvement, some of the lands to be acquired would no doubt be desired for development of parks and recreational facilities and stated that the land would be permanently *under water, and that in the interest of the users of the resulting pools for navigation, recreation and police of their shores, it was considered desirable for the Federal Government to obtain, more than a flowage easement and that, therefore, a fee simple title should be acquired.*" (Emphasis supplied.) The factual bases for the decision of the Circuit Court of Appeals in the *Meyer* case are stated in its opinion as follows (113 F. (2) at p. 392):

> "It should be observed first that the letter was incompetent as evidence, for the reason that it was not written by the official who had the burden of determining the question of necessity but by a subordinate agent with whom the Secretary may or may not have agreed.

> The opinions of such third persons are of no avail to impeach the integrity of the responsible official. Moreover, nothing in this document impeaches the original purpose, namely, betterment of navigation and flood control. Old Dominion Land Co. v. United States, 4 Cir., 296 F. 20, affirmed 269 U. S. 55, 46 S. Ct. 39, 70 L. Ed. 162. The evidence in the record, including that tendered by defendants, tends to disclose only a difference in judgment as to the necessity of a fee simple title—nothing in the way of abuse of discretion. Furthermore, in their cross-complaint defendants averred that the possession of the Government 'would completely destroy' the lands 'by the operation of the dam'. If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite."

As will be seen from the above extract from the opinion in the *Meyer* case, the Circuit Court found that no persuasive evidence had been produced to show that the lands sought to be condemned, were actually unnecessary for the purposes of the Act, but actually it was found that they would be permanently under water as a result of the operation of the dam; and the Court found that no proof had been produced to show abuse of discretion by the Secretary of War.

In the case at bar, the findings of fact were exactly to the contrary of the finding in the *Meyer* case. Here, Petitioner needs none of the lands of the Respondents for any of the purposes expressly enumerated in the Act (R. 24-25, F. of F. 37). Judge Parker, for the Circuit Court of Appeals, stated this fact thus (150 F. (2) 616, 617, R. 126):

> "None of the 44,400 acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone

> or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a contract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway."

The distinction between the instant case and the *Meyer* case must be apparent. There, according to the only competent evidence produced, and under the findings of fact, the lands in question were flooded to the point of "destruction", and the flooded portions had been determined to be actually necessary for "navigation and police of their shores." Contrast that factual situation with the situation now before the Court, and the reason for the difference between the decisions of the Circuit Courts in the two cases, respectively, is readily understood.

U. S. v. *Meyer*, as is contended by the Petitioner, is authority for the proposition that if the use or purpose for which land is sought is a "public use" (one authorized by the statute in question), a legislative agency may determine whether the fee or merely an easement shall be condemned, and that such a determination is not subject to judicial review. The following cases, cited in Petitioner's Brief,[34] are likewise authority for the same proposition of law: *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *Mills* v. *United States*, 46 Fed. 738; *U. S.* v. *Lynah*, 188 U. S. 445; *Hurley* v. *Kincaid*, 285 U. S. 95.

The following cases are cited by Petitioner in its Brief[35] in support of a somewhat similar theory (the so-called theory of "remnant lots" which we have seen was unsuccess-

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[34] Petitioner's Brief 33 and 34.

[35] Petitioner's Brief 34.

fully advanced in *Cincinnati* v. *Vester*, *supra*, Page 20, in an effort to justify the taking of lots of land not actually needed for the project proper, but sought to be condemned because of an alleged connection therewith, found to be too remote): *Armstrong* v. *City of Detroit*, 286 Mich. 277; *Emmons* v. *City of Detroit*, 261 Mich. 455, Aff'd. 255 Mich. 558; *City of Chicago* v. *McCluer*, 339 Ill. 610. We have no quarrel with the principle announced in those cases. But, surely, the Petitioner does not contend that the 44,000-acre area in this case constitutes a "remnant lot".

In concluding our comments on the Petitioner's contention that the flooding of the highway (the taking of the easement) of itself justifies the taking of the fee, perhaps we should revert again to the facts in the instant case, very briefly. We are sure that the Court has clearly in mind the facts with respect to the area actually flooded or expected so to be when the water in the Reservoir is at its highest. We understand that no portion of Highway 288 has been flooded to date at any point easterly from Hickory Flat Branch, which, with a microscope, may be seen on Petitioner's Exhibit 3 (the map following R. 145). Hickory Flat Branch lies a short distance easterly from Nolands Creek. We understand further that the lands which are expected to be flooded by the Reservoir when it is at its highest are shown on the aforementioned map in light blue, and are immediately adjacent to, and follow the banks of the Little Tennessee River and the Tuckasegee River. It is unfortunate that the Map does not show Highway 288. There appears to be nothing on it even to indicate the former location of that road. However, no more than a glance at the Map is necessary, we believe, to show very clearly that the flooding of the Reservoir basin does not destroy the properties of the Respondents located miles therefrom, in any such sense as the landowners' property

was taken and destroyed in the *Meyer* case, or in any of the others relied upon, in this regard, by the Petitioner. Furthermore, if the Court should hold that the mere taking of a road or highway, which serves a particular community or rural section, will in and of itself authorize and empower, or will carry with it the further authority to the condemning body to appropriate all of the lands and all of the properties served by that highway, absolutely irrespective of the use sought to be made thereof, it seems to us that very little imagination is required to realize the dangerous lengths to which any such theory would lead us.

In the forepart of Petitioner's Brief, the contention is made, or the impression is certainly conveyed that TVA contends one of the merits of its proposal to be the saving of great expense. We hope that we have shown, by reference to the testimony of Petitioner's witnesses—and the Court below found (R. 132)—not only that no saving would be accomplished through Petitioner's plan, but that enormously greater expenditures by the Federal Government would be involved therein. On Page 36 of its Brief, evidently in order to avoid the force of the decisions holding that "excess taking" is not justifiable even in the interest of economy, Petitioner makes this statement:

> "The Tennessee Valley Authority is not here seeking to profit from the sale of the lands sought to be acquired or to recoup any part of the cost of the Fontana project."

To put it somewhat bluntly, our reply to the above statement must be, either that our Adversary was not serious in his contention that the alleged economy would justify his plan, or that, in making the above statement, he is quibbling. *Of course*, TVA is not seeking here to take lands for resale at a profit. Nobody has made any such accusation. How-

ever, can it be gainsaid that in the forepart of its Brief, Petitioner argues that its plan will reduce the cost of the Fontana project? In principle, what difference is there between recouping costs and saving expense, as applied to such a situation as that here before us?

We are unable to summarize the rule, that "excess taking" cannot be justified by an economy plea, any more clearly than was done by Judge Parker in his opinion below, as follows (R. 130-131):

> "What the TVA is proposing to do here cannot be distinguished in principle from what was condemned by the Supreme Court of Appeals of Virginia in the Carneal case, supra" (meaning *Richmond v. Carneal*, (Supreme Court of Appl. of Va.), 129 Va. 388, 106 S. E. 403, 14 A.L.R. 1341, and note at 1350) "where Mr. Justice Burks, in a noteworthy opinion, reviews the law and the decisions bearing on the matter. In that case the City of Richmond attempted to take portions of city blocks through which a new boulevard ran, although they were not needed for the boulevard itself. The attempted justification for this excess taking was that, by replatting the lots and readjusting their lines and presumably, selling them to others, the expense of the improvement could be reduced. In City of Cincinnati v. Vester, supra, the Circuit Court of Appeals of the Sixth Circuit condemned an excess taking for a similar purpose. Certainly the condemnation of land to be used in satisfying the state's claim of damages for the flooding of the road cannot be distinguished in principle from these cases which involved the taking of lands to be used in mitigating damages due to the opening or widening of streets. If the TVA, for the purpose of settling a claim for damages, can take land which it does not need for the public project in which it is engaged, no reason suggests itself why the land could not be taken and sold for the purpose of raising funds to satisfy the claim. The right of private property cannot be flouted in this way."

Judge Parker's opinion then proceeds with a quotation from *Bloodgood* v. *Mohawk & H. River R. Co.*, *supra*, page 39.

Conclusion

The sociological problems which might have been involved if TVA had not provided a substitute highway for any part of the 44,000-acre area, we submit, are, certainly at this point, purely of academic interest. To some, such problems may still seem to be such as concern primarily the State and the County. Whatever may be the proper view about that, as a practical proposition the Court is not concerned with it. We do not want to be understood to suggest that this Court must ignore any practicalities that may be involved, particularly any that are inherent in the situation in the instant proceeding. Consequently, in closing, perhaps we should suggest briefly—and we will do so in all humility and with the realization that primarily this may be considered to be TVA's "affair"—a practical solution of the problem, that may be posed, with respect to the lands owned by the Respondents and to the inhabitants thereof.

The Dam and the Reservoir have long since been completed. The 38,000 acres westerly from Nolands Creek have actually been excluded from this proceeding. The War, for most practical purposes at least, has finally ended. All of the Respondents are in actual occupation of their properties, and most of them now live there continuously. They now have access, of a fashion, to their properties. Concededly, however, a road, for a distance of about six to eight miles, perhaps similar in character (gravel) to Highway 288, is needed, near where the extreme easterly end of 288 was formerly located. The expense of acquiring the right-of-way there, and of constructing such a road, would be comparatively little. TVA has substantially complied, at least to the extent legally possible, to its obligations

under the 4-party Contract. Neither the State nor the County can properly complain if a short road should be substituted. No material damage will have been done to either the State or the County, because, as the representatives of the State testified (R. 52,-57), Highway 288 was of practically no actual value as a connecting link in North Carolina highways, nor as a "through-road."

Interested though this Court may be in any practical problems that may now concern TVA in this situation, we must assume that the issues here must actually be determined on the basis of legal principles.

Hereinabove, attention has been called to certain fundamental principles of law relating to the exercise of the power of eminent domain. They may be briefly summarized thus: the Doctrine of "public use"; the rule that the burden rests squarely upon a condemnor to show clear authority for a proposed taking; the principle that statutes authorizing condemnation must be strictly construed, and that all doubts are to be resolved against the alleged power to condemn; and the rule against "excess taking", even to accomplish economies.

Concededly, Respondents' lands are not sought for any purpose for which condemnation is expressly authorized by the Act. Authority for such taking cannot be said to be necessarily implied from anything contained in the Act. The use to be made of Respondents' land, if condemned, is entirely too remote, we submit, to be sanctioned by this Court under the law.

We urge that the judgment of the Court below be affirmed.

Respectfully submitted,

G. L. Jones,
George H. Ward,
Attorneys for all Respondents
Other Than S. Columbus Welch.

APPENDIX

The following include the sections of the T. V. A. Act which both sides agree to be pertinent in this proceeding, and those alleged by either the Petitioner or the Respondents to be pertinent:

Opening Sentence of Act (Title 16 U. S. C. A., Sec. 831)—

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the 'Tennessee Valley Authority' (hereinafter referred to as the 'Corporation')."

Powers of T. V. A.

Section 4(h) (Title 16, 831c(h)):

"(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act."

Section 4(i) (Title 16, 831 c(i));

"(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation

projects at any point along the Tennessee River, or any of its tributaries, and in the event "that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings (48 Stat. 60-61): PROVIDED, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code. (49 Stat. 1075.)"

Section 4(k) (Title 16, 831 c(k) (a-d)):

"(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: PROVIDED, That no transfer authorized herein in (b) shall be made without the approval of Congress; AND PROVIDED FURTHER, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or

otherwise, to the Ingall Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

"(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: PROVIDED, HOWEVER, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: AND PROVIDED FURTHER, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President."

Section 4(l) (Title 16, 831c(l)):

"(1) Shall have power to advise and cooperate in the readjustment of the population displaced by the

construction of dams, the acquisition of reservoir areas the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end. (49 Stat. 1080.)"

Section 18 (Title 16, 831q):

"Sec. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam transmission line, and power house shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River."

Section 25 (Title 16, 831x):

"Section 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation

of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America. • • • "

Section 31:

"Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: PROVIDED, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act."

Report of Majority of House of Representatives Committee on Military Affairs, Re. Section 31 of Act:

"The vital and controversial part of this section will be found in the latter part thereof stipulating that no real estate shall be acquired or held by the Authority except what is necessary to carry out its plans and projects actually decided upon requiring the use of such real estate. There is a proviso also that any land that has been purchased by the Authority

and whose ownership is not necessary to carry out the plans and projects of the Authority actually decided upon, then that such land shall be sold by the Authority as the agent of the United States, after due advertisement, at public auction to the highest bidder. It is manifest that the Authority should not go into the real-estate business. The buying and selling of real estate not actually necessary for carrying out actual plans of navigation and flood control would have no proper logical or legal relation to regulating interstate commerce.

Therefore, section 11 should and will be construed in connection with section 3 of this bill. Any lands that the Authority has and does not need for such actual development should be sold, and all property of the United States should be sold, only after "due advertisement at public auction to the highest bidder for cash. The Government cannot afford to play favorites among any of its citizens. The buying and selling of land not necessary for developing navigation, and having no proper logical and legal connection therewith cannot be constitutionally authorized nor constitutionally exercised. Any lands actually needed can be acquired by eminent domain."

Supplemental Views of Mr. Kvale and Mr. Maverick on H. R. 8632 (Minority Report):

"The actual provisions of this section, as reported by your committee, prohibit the purchase of any land not 'actually necessary to carry out plans and projects actually decided upon requiring the use of such lands.' It also requires the Authority to sell immediately any land which it has already acquired and which it does not need for carrying out plans 'actually decided upon'.

In the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line. A program of soil protection and forestation essential to the protection of the reservoirs is being developed for these lands, but cannot wisely be adopted until further work has

been done on it. These lands were not purchased haphazardly. It was efficient and economical to acquire them at the same time that the Corporation's other land acquisition was accomplished.

For example, in some sections in the reservoir areas, little peninsulas of land are necessarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the lands in peninsulas than to construct new roads along the steep mountain sides.

To require the immediate sale of such lands, pending completion of final plans for their use, would constitute a great waste and great financial loss to the United States; and to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project."

SUPREME COURT OF THE UNITED STATES.

Nos. 528, 529, 530, 531, 532, 533.—October Term, 1945.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
528 *vs.*
S. Columbus Welch.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
529 *vs.*
John Burns, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
530 *vs.*
Fred Lollis, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
531 *vs.*
Arnold E. Bradshaw, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
532 *vs.*
Philip G. Rust, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
533 *vs.*
Abraham Cole Hyatt, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The United States, on behalf of the Tennessee Valley Authority, filed petitions in the District Court to condemn six tracts of land located in North Carolina and owned by the several respondents. It asserted that the power to condemn the land in question was conferred upon the Authority by the provisions of the Tennessee Valley Authority Act as amended, 48 Stat. 58 as amended, 16 U. S. C. 831-831 dd. The District Court held that the Act did not authorize condemnations under the facts shown by the evidence and dismissed the petitions. The Circuit Court of Appeals af-

firmed. 150 F. 2d 613. Since the grant of power to condemn needed properties is an essential part of the Act, we granted certiorari.

The following basic facts form the background of this proceeding: Congress in 1942 in order to meet pressing power needs for war production empowered the Authority to construct Fontana Dam, on the Little Tennessee River in North Carolina. H. Rep. 1470; 77th Cong. 1st Sess. 25. The dam is one of the world's largest and creates a reservoir twenty-nine miles long. [illegible] this reservoir and the Great Smoky Mountains National Park [illegible] forty-four thousand acres of mountainous land, including the [illegible] which the government wants to condemn here. When [illegible] authorized construction of the dam, two hundred and six families occupied this area. Their only convenient means of [illegible] and egress, except for foot trails, was North Carolina Highway No. 288, a road approximately fifty miles in length. When the dam was built the reservoir flooded nine of the highway, rendering it useless for travel. As a result, the area remained practically isolated.

As events have shown, the problem this situation created could not be easily solved. Any solution had to take into consideration the interests of the United States, of North Carolina, and of Swain County, N. C., as well as the interests of the individuals affected. The United States' interest was that of the T. V. A. and the National Park Service. The T. V. A. had a dual interest. First, the isolated area, while not actually submerged by the reservoir, was a part of the watershed. Left in private hands it could be used to frustrate some of the objectives of T. V. A. legislation. Second, the fact that the dam had caused the highway to be flooded created a serious problem for the inhabitants and property owners in the area who had been damaged by the project. It was the statutory duty of the T. V. A. to attempt to bring about proper adjustments in order to alleviate resulting hardship and inconvenience. At the same time, the T. V. A. was not supposed to waste the money of the United States. The United States' interest in the land through the National Park Service was due to the fact that this particular area had been included in the Great Smoky Mountains Park project. Had this land been actually owned by the United States for park purposes it would have been easier to subject it to servitudes in the interest of the T. V. A. development. North Carolina was interested in the land because it was its duty

to continue to hold and maintain a highway so long as its citizens continued to live within the area. Swain County had a similar interest. It had issued bonds to finance building the highway. Part of the bond issue was still outstanding.

Conferences between the interested groups brought to light facts which led to the solution ultimately adopted. It was agreed on all sides that the old road was narrow, dangerous, and far below modern standards for useful highways. Investigation showed that replacement of the old road with the same undesirable type of highway would cost about $1,400,000.00, while the cost of building an improved highway would greatly exceed that amount. All parties felt that the United States had neither a legal nor moral duty to build a new road of the superior type and quality needed. This meant that type of road could only be built if North Carolina would bear the additional expense. Since the highway carried no through traffic and serviced so few people, the state was not willing to pay for the added cost and all parties agreed that such an expenditure would be wasteful and unjustifiable. The War Production Board presented further obstacles. It was of the opinion that the road was not sufficiently essential to warrant use of the materials and manpower its construction would require. For these and other reasons North Carolina objected to the T. V. A.'s settling the controversy by a mere payment of damages to it for injury to the road and by the payment of damages to individual owners for destroying their access to the area. The State contended that this would leave the area in private hands with no adequate roads to serve the people and would impose unwise, if not impossible burdens, on the State and County in connection with providing schools, police protection, health services, and other necessary facilities.

After a year and a half of negotiations a solution was worked out. After the proposed solution was approved by the Governor, the Council of the State, and the Legislature of North Carolina, it was embodied in a settlement agreement between the State, the County, the National Park Service, and the T. V. A. Under that agreement the T. V. A. with the aid of a $100,000 contribution by the State was to acquire all the land in the isolated area, either by purchase or condemnation, so as to relieve the State from further responsibility for maintaining a highway to that section; Swain County was to be paid $400,000 by the Authority to help retire its outstanding road bonds; and the Authority was to transfer all

the area lands to the National Park Service for inclusion within the Great Smoky Mountains National Park but reserving to the T. V. A. all rights required to carry out the T. V. A. program. The agreement, thus, satisfied the interests of the state, the county, the T. V. A., and the National Park Service. The cost to the United States was several hundred thousand dollars less than the cost of rebuilding the old road. And all the landowners in the area, except these six respondents who refused to sell, have received full compensation for their property.

The Courts below have held that T. V. A. had no power under the Act to condemn the tracts of these respondents as contemplated by the agreement. The District Court reached this conclusion by limiting the Authority's power so that it can condemn only those lands which are needed for the dam and reservoir proper. It reasoned that the common law rule of construction requires that statutory powers to condemn be given a restrictive interpretation. But Section 31 of the Act expressly provides that the Act shall be "liberally construed to carry out the purposes of Congress to provide . . . for the national defense, improve navigation, control destructive floods and promote interstate commerce and the general welfare." In the face of this declaration, the District Court erred in following the asserted common law rule.

The Circuit Court of Appeals, without expressly relying on a compelling rule of construction that would give the restrictive scope to the T. V. A. Act given it by the district court, also interpreted the statute narrowly. It first analyzed the facts by segregating the total problem into distinct parts and, thus, came to the conclusion that T. V. A.'s purpose in condemning the land in question was only one to reduce its liability arising from the destruction of the highway. The Court held that use of the lands for that purpose is a "private" and not a "public use" or, at best, a "public use" not authorized by the statute. We are unable to agree with the reasoning and conclusion of the Circuit Court of Appeals.

We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority. *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 679. It is true that this Court did say in *Cincinnati* v. *Vester*, 281 U. S.

439, 446, that "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn "excess" property on the ground that the state law had not authorized it. And in *Hairston* v. *Danville and Western Railway*, 208 U. S. 598, 607, this Court, referring to the "rule" later stated in the *Vester* case, said that "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State Court as a taking for public uses in conformity with its laws." And see *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 257, 260-261. But whatever may be the scope of the judicial power to determine what is a "public use" in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject "Its decision is entitled to deference until it is shown to involve an impossibility." *Old Dominion Co.* v. *United States*, 269 U. S. 55, 56. Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields. See *Case* v. *Bowles*, decided February 4, 1946, slip opinion p. 6; *United States* v. *New York*, — U. S. —. We hold that the T. V. A. took the tracts here involved for a public purpose, if, as we think is the case, Congress authorized the Authority to acquire, hold, and use the lands to carry out the purposes of the T. V. A. Act.

In passing upon the authority of the T. V. A. we would do violence to fact were we to break one inseparable transaction into separate units. We view the entire transaction as a single integrated effort on the part of T. V. A. to carry on its Congressionally authorized functions. Cf. *United States* v. *Commodore Park*, 324 U. S. 386, 392. And we find not only that Congress authorized the Authority's action, but also that the T. V. A. has proceeded in complete accord with the Congressional policy embodied in the Act. That Act does far more than authorize the T. V. A. to build isolated dams. The broad responsibilities placed on the Authority relate to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley. The T. V. A. was empowered to make contracts,

purchase and sell property deemed necessary or convenient in the transaction of its business, and to build dams, reservoirs, transmission lines, power houses, and other structures. It was particularly admonished to cooperate with other governmental agencies—federal, state, and local—specifically in relation to the problem of "readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisitions of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act." All of the Authority's actions in these respects were to be directed towards "development of the natural resources of the Tennessee River drainage basis and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic and social development of said areas." To discharge its responsibilities the T. V. A. was granted "such powers as may be necessary or appropriate" for their exercise. Section 4(h) of the Act gives the T. V. A. the very broad power to "exercise the right of eminent domain." Section 4 i of the Act empowers the Authority to condemn certain specified types of property and concludes by referring to "all property that it [the Authority] deems necessary for carrying out the purposes of this Act." To make clear beyond any doubt the T. V. A.'s broad power, Congress in Section 25 authorized the Authority to file proceedings, such as the ones before us, "for the acquisition by condemnation of any lands, easements, or rights of way which in the opinion of the corporation are necessary to carry out the provisions of this Act."

All of these provisions show a clear Congressional purpose to grant the Authority all the power needed to acquire lands by purchase or by condemnation which it deems necessary for carrying out the Act's purposes. These proceedings were preceded by a T. V. A. resolution that it did deem these acquisitions necessary for such purposes. Despite Congress' clear expression of its purpose to grant broad condemnation power to T. V. A. we are asked to hold that the Authority's power is less than the powers to condemn granted other governmental agencies, which under 40 U. S. C. 257 have been held to have a power to condemn coextensive with their power to purchase. *Hanson Company* v. *United States*, 261 U. S. 581, 587. Neither the fact that the authority

wanted to prevent a waste of government funds, nor that it intended to cooperate with the National Park Commission detracted from its power to condemn granted by the Act. The cost of public projects is a relevant element in all of them, and the government, just as anyone else, is not required to proceed oblivious to elements of cost. Cf. *Old Dominion Co.* v. *United States*, *supra*. And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public. *Brown* v. *United States*, 263 U. S. 78. Where public need requires acquisition of property, that need is not to be denied because of an individual's unwillingness to sell. *Kohl et al.* v. *United States*, 91 U. S. 367, 371. When the need arises individuals may be required to relinquish ownership of property so long as they are given that just compensation which the Constitution requires. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. Such compensation can be awarded these respondents by the District Court.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice REED, concurring.

I agree that the TVA has authority to condemn the tracts of land which the Authority seeks to acquire by these proceedings.

This authority flows from the power of eminent domain granted by sections 4 and 25 of the Tennessee Valley Authority Act, 48 Stat. 58, as amended. The grant which allows condemnation of all property that the Authority "deems necessary for carrying out the purposes of this Act," is in sufficiently broad terms, it seems to me, to justify these condemnations. When the Authority was faced with the problem of justly compensating the occupants of the forty-four thousand acre area between the Fontana Dam lake and the Great Smoky Mountains National Park, North Carolina and Swain County for the destruction of Highway No. 288, it could within its delegated powers purchase or condemn the lands affected or build a substitute highway whichever appeared cheaper. The United States is not barred from the exercise of good business judgment in its construction work. *Brown* v. *United States*, 263 U. S. 78. See *United States* v. *Meyer*, 113 F. 2d 387;

Old Dominion Land Co. v. *United States*, 296 F. 20, 269 U. S. 55, 66. Such action is not "outside land speculation." 263 U. S. at 84. It follows that having this power, the Authority could contract, as it did, to reduce its expenditures by the contract arrangements of July 30, 1943, with Swain County and North Carolina. With the Authority's power to turn over its lands to the National Park, we are not here concerned. Under the contract the public rights in Highway No. 288 were acquired by the Authority and it agreed to acquire the lands here in controversy. The acquisition of the whole area was a factor in these arrangements and the condemnation of these smaller tracts is a part of the transaction.

I do not join in the opinion of the Court because of certain language on slip opinion pages 4, 5 and 6 which implies to me that there is no judicial review of the Authority's determination that acquisition of these isolated pieces of private property is within the purposes of the TVA Act. The Court seems to accept the Authority's argument that a good faith determination by it that property is necessary for the purposes of the Act bars judicial review as to whether the proposed use will be within the statutory limits. This argument of lack of judicial power properly was rejected by the Circuit Court of Appeals although, as explained above, I think that court erroneously held that the TVA Act did not authorize these condemnations. 150 F. 2d 613, 616. It is my opinion that the TVA is a creature of its statute and found by the terms of that statute, and that its every act may be tested judicially, by any party with standing to do so, to determine whether it moves within the authority granted to it by Congress. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Social Security Board* v. *Nierotko*, No. 318, October Term 1945, decided February 25, 1946, slip opinion p. 8.

This taking is for a public purpose but whether it is or is not is a judicial question. Of course, the legislative or administrative determination has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizen. The former cases go no further than this. *United States* v. *Gettysburg Electric*

Ry., 160 U. S. 668, 680; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 709; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66; *Cincinnati* v. *Vester*, 281 U. S. 439, 446.

Once it is admitted or judicially determined that a proposed condemnation is for a public purpose and within the statutory authority, a political or judicially non-reviewable question may emerge, to wit, the necessity or expediency of the condemnation of the particular property. These are the cases that led the TVA, erroneously in my view, to assert the action of its Board could "not be set aside by a court." *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 708.

The CHIEF JUSTICE joins in this opinion.

Mr. Justice FRANKFURTER concurring.

I join in the opinion of the Court for I do not read it as does my brother REED. The Bill of Rights provides that private property shall not "be taken for public use without compensation." U. S. Const., Amend. V. This Court has never deviated from the view that under the Constitution a claim that a taking is not "for public use" is open for judicial consideration, ultimately by this Court. It is equally true that in the numerous cases in which the issue was adjudicated, this Court never found that the legislative determination that the use was "public" exceeded Constitutional bounds. But the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting. All the cases cited in the Court's opinion sustaining a taking recognize and accept the power of judicial review. I assume that in citing these cases the Court again recognizes the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence.